SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 518

M. C. GARBER, PETITIONER,

vs.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Western District of Oklahoma	1	1
Bill of complaint	1	1
Exhibit "A"—Judgment, case No. 13225, Garfield County, Oklahoma, Ralph Crews et al. v. American National Bank of Enid, Oklahoma	16	15
Answer of M. C. Garber	51	18
Statement of matters stipulated	105	26
Findings of fact and conclusions of law	123	39
Minute entry, September 16, 1943, correcting certain findings of fact etc.	151	71
Judgment	151	72
Exhibits:		
Plaintiffs' exhibit 1—Agreement, November 25, 1929, between American National Bank of Enid, Oklahoma and First National Bank of Enid, Oklahoma	211	88
Plaintiffs' exhibit 8:		
Minutes of meeting of Board of Directors, American National Bank of Enid, Oklahoma, November 25, 1929	226	94
Minutes of meeting of stockholders, American National Bank of Enid, Oklahoma, December 20, 1929	230	97
Minutes of meeting of Board of Directors, American National Bank of Enid, Oklahoma, December 20, 1929	233	99

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 20, 1944.

—5665

	Original	Print
Record from D. C. U. S., Western District of Oklahoma—Continued		
Exhibits—Continued		
Defendants' exhibit 1—Notice by publication of closing of American National Bank of Enid, Oklahoma, and succession of First National Bank of Enid, Oklahoma	235	101
Plaintiffs' exhibit 116—Amended petition, case No. 13225, Ralph Crews et al. v. T. E. Vessels et al., District Court, Garfield County, Oklahoma	236	102
Plaintiffs' exhibit —Judgment, case No. 13225, Ralph Crews et al. v. American National Bank of Enid, Oklahoma, District Court, Garfield County, Oklahoma	284	104
Proceedings in U.S.C.C.A., Tenth Circuit	417	107
Orders of submission	417	107
Opinion, Huxman, J.	418	108
Judgment	432	122
Petition for rehearing	443	122
Opinion on petition for rehearing, Huxman, J.	455	131
Order denying petition for rehearing	456	133
Order staying mandates	466	133
Clerk's certificate (omitted in printing)	467	
Order allowing certiorari	469	133
Stipulation as to parts of record to be printed	470	134

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 2029. Equity

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, Amy Tresner nee Crews, and Mary Willis nee Crews, Plaintiffs,

vs.

EUGENE WATROUS, IRENE WATROUS, N. E. CRUMPACKER, Faith W. Crumpacker, C. F. Randolph, Mrs. W. B. Johnston, R. L. Sanford, E. M. Abbott, D. J. Oven, G. E. Hudson, J. M. Gentry, Glowrene Gentry Hoehn, C. Brumfield, R. R. Kisner, Burchard Denker, G. E. Munger, F. C. Klossner, John J. Vater, Katie Gannon, Ruth Munger, nee Cannon, M. C. Garber, Florence Gannon Lovell, nee Gannon, George B. Roberts, Geo. B. Roberts, as Trustee, Bess R. Nelson, Margaret Van Dyne, Max M. Roberts, Helen Walker King, nee Walker, Louis H. Walker, Henry F. Walker, Herman A. Walker, Lydia C. Walker, Theodore C. Walker, Malinda M. Walker, Ed Klein, Joseph Weil, Albert Hirsch, Morris Hirsch, Max Hirsch, T. E. Vessels, Floyd E. Felt, Bess C. Felt, Kathryn Vessels, Joseph Meibergen, as Administrator With the Will Annexed of the Estate of W. B. Johnston, Deceased, and American National Bank of Enid, Oklahoma, a Corporation, Defendants

BILL OF COMPLAINT—Filed January 20, 1938

Come now the plaintiffs above named and complaining of the defendants above named, allege and state:

I

That the plaintiffs, Ralph Crews, Charley Crews, Robert Crews, Everett Crews and Amy Tresner, nee Crews, are citizens, residents and inhabitants of the State of Okla- [fol. 2] homa, and the plaintiff Mary Willis, nee Crews, is a resident, citizen and inhabitant of the State of Oregon.

That the defendant, American National Bank of Enid, Oklahoma, is a banking corporation and association, duly

organized under the laws of the United States, which corporation and association was and is located or established and domiciled at Enid, in the western federal district of Oklahoma.

That the defendants, N. E. Crumpacker, E. M. Abbott, R. L. Sanford, C. Brumfield, R. R. Kisner, Burchard Denker, G. E. Hudson, G. E. Munger, F. C. Klossner, John J. Vater, Eugene Watrous, Irene Watrous, D. J. Oven, Faith W. Crumpacker, J. M. Gentry, Glowrence Gentry Hoehn, C. F. Randolph, Mrs. W. B. Johnston, and M. C. Garber, are citizens, residents and inhabitants of the western federal district of Oklahoma.

That the defendant, Joseph Meibergen, is the duly appointed, qualified and acting administrator with the Will annexed of the estate of W. B. Johnston, deceased, and a citizen, resident and inhabitant of the western federal district of Oklahoma.

That the defendants, Helen Walker King, nee Walker, Herman A. Walker, Lydia C. Walker, Theodore C. Walker and Malinda M. Walker are citizens, residents and inhabitants of the western federal district of Oklahoma; that the defendants Louis H. Walker and Henry F. Walker are citizens, residents and inhabitants of the State of California and not within the jurisdiction of this Court.

That the defendants, George B. Roberts as trustee, George B. Roberts, Max M. Roberts are citizens, residents and inhabitants of the western federal district of Oklahoma; and the defendants Bess R. Nelson is a resident of the eastern federal district of Oklahoma, and that the defendant Margaret Van Dyne is a citizen, resident and inhabitant of the State of Oregon and not within the jurisdiction of this Court.

That the defendants, Katie Gannon, Ruth Munger, nee Gannon, Florence Gannon Lovell, nee Gannon, are residents, citizens and inhabitants of the western district of Oklahoma.

[fol. 3] That the defendants, Albert Hirsch, Max Hirsch and Morris Hirsch and Joseph Weil are citizens, residents and inhabitants of the State of California and are not within the jurisdiction of this Court.

That the defendants, T. E. Vessels, Kathryn Vessels, Floyd E. Felt, Bess C. Felt and Ed Klein are citizens, residents, and inhabitants of the State of Texas, and are not within the jurisdiction of this Court.

II

That the aforesaid American National Bank of Enid, Oklahoma, ceased to carry on a banking business on or about November 25, 1929, and on said date disposed of substantially all of its assets save and except the money it received for its assets, and on or about said date went into voluntary liquidation. That said bank was then insolvent and for a long time prior thereto had been insolvent, and ever since has been and still is insolvent. That said bank after it ceased to carry on the banking business and after it had gone into voluntary liquidation, and while it was insolvent, paid out and distributed to the stockholders in said bank the full sum of $240,000.00, without leaving or reserving any money, assets or property with which to pay the indebtedness or obligations of said bank. That said bank at the time of the distribution of said $240,000.00 had debts, liabilities and obligations in excess of $249,000.00. That this is a suit to enforce and judicially administer the trust arising from the insolvency and proceedings in liquidation and to enforce the liability of the stockholders of such bank, and is a suit arising under the laws of the United States and thus within the jurisdiction of this Court.

III

That said American National Bank of Enid, Oklahoma, at all times herein mentioned, had an authorized capital stock of $200,000.00, and at all times herein mentioned all of said capital stock was issued and delivered to the various stockholders in said bank and on the date when said bank went into voluntary liquidation there was issued and outstanding the full amount thereof, divided into 2000 equal shares.

[fol. 4] IV

That on December 16, 1931, the plaintiffs commenced an action in the District Court of Garfield County, Oklahoma, against the aforesaid American National Bank of Enid, Oklahoma, as defendant, to recover a money judgment for certain conversions and embezzlements by said American National Bank and in which it aided, assisted and participated during the period beginning in December, 1922, and continuing into the year 1929, prior to November 25, 1929. That said American National Bank was duly served

with summons therein and appeared and filed its answer in said action. That the issues were duly joined in said action and same was duly tried during October, 1937, and on the 29th day of October, 1937, by the consideration of the court and jury in said action plaintiffs recovered a judgment against the said American National Bank in the sum of $249,000.00 with interest thereon at six per cent per annum from that date, and for the costs of said action, which costs amount to the sum of $178.25. A full, true and complete copy of said judgment is hereto attached, marked Exhibit "A" and made a part hereof.

That thereafter on December 9, 1937, the motion for a new trial theretofore filed by said bank was overruled and on the 9th day of December, 1937, execution was duly issued on said judgment, and was thereafter duly returned wholly unsatisfied and endorsed "no property found." That said judgment is in full force and effect, unpaid and wholly unsatisfied in the full sum of $249,000.00 together with interest and costs as above stated, and plaintiffs bring this suit in the nature of a *creditors* bill brought by them on behalf of themselves, and all other creditors of said bank. That the plaintiffs do not know and cannot state the names of any other creditors, and in this connection plaintiffs allege that they are informed and believe and, therefore, charge the fact to be that there are now no creditors of said American National Bank other than these plaintiffs.

V

That at the date the American National Bank of Enid ceased to carry on a banking business and went into voluntary liquidation, Charles K. Walker was the record [fol. 5] owner of twenty (20) shares of the capital stock of said bank. That theretofore, and prior to April, 1926, the said Charles K. Walker died, and thereafter the estate was duly probated in the County Court of Garfield County, Oklahoma, and by the Judgment and final decree of distribution in said estate the same, including the said shares of stock in said bank, was duly distributed one-third to the defendant, Helen Walker King, nee Walker; and one-ninth to each of the following named defendants: Louis H. Walker, Henry F. Walker, Herman A. Walker, Lydia C. Walker, Theodore C. Walker and Malinda M. Walker; each of said last seven named persons being the sole heirs and sole dis-

tributees of the estate of Charles K. Walker, deceased, and plaintiffs allege that said estate has been finally closed.

That at the date the American National Bank of Enid ceased to carry on a banking business and went into voluntary liquidation, C. E. Gannon was the owner of one hundred thirty (130) shares of the capital stock in said American National Bank, and thereafter there was distributed to the said C. E. Gannon, as his proportionate part of the $240,000.00 above referred to, the sum of $120.00 per share, that is, $15,600; and thereafter said C. E. Gannon, died in Garfield County, Oklahoma, and thereafter the estate of said C. E. Gannon was duly probated in the County Court of Garfield County, Oklahoma, and by the judgment and final decree of distribution in said estate the same was duly distributed one-third each to the defendants, Katie Gannon, Ruth Munger, nee Gannon, and Florence Gannon Lovell, nee Gannon; said last three named defendants being the sole heirs and sole distributees of the estate of C. E. Gannon, deceased, and said defendants received from said estate as heirs and distributees thereof money and property in excess of the sum of $15,600.00, and plaintiffs allege that said estate has been finally closed.

That the defendant, George B. Roberts as trustee, is trustee for himself and for Bess R. Nelson, Margaret Van Dyne and Max M. Roberts, and the proportionate part of said $240,000.00. above mentioned distributed to stockholders after the American National Bank went into voluntary liquidation was distributed to and received by said George [fol. 6] B. Roberts as trustee, and was impressed with the trust herein alleged in favor of the plaintiffs herein, and the other creditors of said bank, and said funds were distributed by said George B. Roberts, Trustee, to the above named heirs in the proportion of two-fifths (2/5) to himself and one-fifth (1/5) to each of the other three persons above named.

That at the date the American National Bank of Enid ceased to carry on a banking business and went into voluntary liquidation, Clara M. Oven was the owner of forty-five (45) shares of the capital stock in said American National Bank, and thereafter there was distributed to the said Clara M. Oven her proportionate part of the $240,000.00 above referred to, that is the sum of $5,400.00; and thereafter the said Clara M. Oven died in Garfield County, Oklahoma, and

thereafter the estate of the said Clara M. Oven was duly probated in the County Court of Garfield County, Oklahoma, and by the judgment and final decree of distribution in said estate the same was distributed to her sole heir and distributee, D. J. Oven, and the said defendant, D. J. Oven received from said estate as the sole heir and distributee thereof money and property in excess of the sum of $5,400.00, and plaintiffs allege that said estate has been finally closed.

First Cause of Action

For their first cause of action against the defendants, plaintiffs allege and state:

I

Plaintiffs hereby reallege all the matters stated in this bill of complaint preceding this the first cause of action, and said matters and allegations are hereby incorporated herein by reference to the same extent as if again specifically plead, and in addition thereto plaintiffs further allege:

II

Plaintiffs allege that from and after the date when said bank went into voluntary liquidation and at the time it paid out and distributed to the stockholders the aforesaid sum of $240,000. said bank was insolvent and had not sufficient assets, or any assets, with which to pay its debts, liabilities [fol. 7] and obligations, and the said $240,000.00 became and was a trust fund for the primary benefit of creditors, including plaintiffs, and said $240,000.00 thus paid out to stockholders was in equity the money of the creditors including plaintiffs. That said trust was violated and the creditors, including plaintiffs, defrauded in that said bank caused said $240,000.00 to be distributed among its stockholders without reserving or keeping sufficient property or money with which to pay creditors, and said stockholders took said funds, property and money so distributed to them and applied same to their own use.

III

That said $240,000.00 was distributed to the stockholders of said bank on a pro-rata basis, each shareholder receiving $120.00 for each share of stock owned by him. That after

said funds, money and property were so distributed among and to the shareholders certain of the shareholders were required to and did refund and restore to said bank, or its liquidating officers and agents for it, a part of said distributed funds, the exact amount so refunded and restored, and by whom of the shareholders refunded and restored being to plaintiffs unknown, but well known to each of the defendants, and in this connection plaintiffs aver that in the instances where same were restored and refunded, the amounts so refunded and restored were only a part of the funds so distributed in excess of $100.00 per share, and in every instance each of the shareholders retained not less than a sum equal to $100.00 for each share of stock owned by him, and many of the stockholders retained the full sum theretofore so distributed to them, that is, the full $120.00 per share, but that it will require an accounting herein to determine which stockholders have refunded and restored any part of said funds so distributed and the amounts thereof.

That at the dates of the distribution of said $240,000.00 the capital stock of said American National Bank was owned by the hereinafter named defendants and in the following amounts, and to whom same was distributed on the basis of $120.00 per share, viz:

[fol. 8]

Owner of Shares	Number of Shares
N. E. Crumpacker	251
Joseph Weil	15
E. M. Abbott	10
R. L. Sanford	15
C. Brumfield	10
Floyd E. Felt	30
R. R. Kisner	10
Burchard Denker	20
T. E. Vessels	129
Charles K. Walker	20
R. D. Anderson	10
G. E. Hudson	10
Max Hirsch	96
Albert Hirsch	98
Morris Hirsch	96
Ed Klein	100
G. E. Munger	16

Owner of Shares	Number of Shares
Florence Gannon Lovell	21
F. C. Klossner	10
Clara M. Oven	45
John J. Vater	5
C. E. Gannon	130
George B. Roberts, Trustee	18
Eugene Watrous and Irene Watrous	90
D. J. Oven	519
Kathryn Vessels	30
Bess C. Felt	10
Faith W. Crumpacker	25
J. M. Gentry	27½
Glowrene G. Hoehn	27½
C. F. Randolph	80
Mrs. W. B. Johnston	26

That as to the stock shown as owned by Charles K. Walker, said Charles K. Walker died prior to April, 1926, and his estate was thereafter duly probated as hereinbefore alleged; that said stock was by final decree of distribution duly distributed to his heirs as hereinbefore alleged in the first sub-paragraph of paragraph V of the allegations set forth preceding the First Cause of Action, and said stock was actually on the date said funds were dis- [fol. 9] tributed owned by said heirs in the proportion above stated and the full sum of $2,400.00 was paid to each of said heirs.

Wherefore, plaintiffs pray that an account be taken of the amounts received by each of the shareholders in said American National Bank of Enid, Oklahoma, and retained by them of the $240,000.00 distributed to the shareholders after said bank went into voluntary liquidation, and that plaintiffs and such other creditors, if any, as may appear herein and establish their rights, have judgment against each of said defendants individually for the amount so ascertained to have been received and retained by him, together with interest thereon at six per cent per annum from the date same was received by him, together with costs; and such other and further relief as under the facts plaintiffs are entitled to receive.

Second Cause of Action

For their second cause of action against the defendants, plaintiffs allege and state:

I

Plaintiffs hereby re-allege and re-aver all the matters stated in this bill of complaint preceding the first cause of action herein, and said matters and allegations are hereby incorporated herein by reference the same as if again stated herein at length, and in addition thereto plaintiffs further allege:

II

Plaintiffs allege that on the date when said bank ceased to carry on a banking business and went into voluntary liquidation it previously had been, then was, and ever since continued to be, and still is insolvent.

That the capital stock in said American National Bank on said date was owned by the hereinafter named defendants, and in the following amounts, namely:

[fol. 10]

Owner of Shares	Number of shares
N. E. Crumpacker	251
Joseph Weil	15
E. M. Abbott	10
R. L. Sanford	15
C. Brumfield	10
Floyd E. Felt	30
R. R. Kisner	10
Burchard Denker	20
T. E. Vessels	129
Charles K. Walker	20
R. D. Anderson	10
G. E. Hudson	10
Max Hirsch	96
Albert Hirsch	98
Morris Hirsch	96
Ed Klein	100
G. E. Munger	16
Florence Gannon Lovell	21
F. C. Klossner	10
Clara M. Oven	45

Owner of Shares	Number of shares
John J. Vater	5
C. E. Gannon	130
George B. Roberts, Trustee	18
Eugene Watrous and Irene Watrous	90
D. J. Oven	519
Kathryn Vessels	30
Bess C. Felt	10
Faith W. Crumpacker	25
J. M. Gentry	27½
Glowrene G. Hoehn	27½
C. F. Randolph	80
Mrs. W. B. Johnston	26

and as such owners said defendants, and each of them, are individually responsible for the debts of said bank each to the amount of his stock therein, at the par value thereof, in addition to the amount invested in said stock, and as to the shares above shown to be owned by Charles K. Walker, C. E. Gannon, and Clara M. Oven, the heirs and distributees [fol. 11] of said estates as hereinbefore shown are liable therefor.

III

That within sixty (60) days next before the date when said bank went into voluntary liquidation, and within sixty (60) days next before the date when said bank failed to meet its obligations, and while said bank was insolvent and unable to meet its obligations, various of the then stockholders in said bank transferred their shares or registered the transfer thereof on the books of said bank, said person so owning same, together with the persons to whom same were so transferred or registered being the following defendants, and the following amounts:

Transferor	Transferee	No. of Shares
M. C. Garber	D. J. Oven	125
W. B. Johnston, (is now deceased, and Joseph Meibergen is the administrator with the will annexed)	D. J. Oven	64

and plaintiffs aver that the said transferors are individually responsible for the debts of such bank each to the amount

of his stock therein, at the par value thereof in addition to the amount invested in such stock, to the same extent as if he had made no such transfer to the extent that such transferee fails to meet such liability, and that the estate of said W. B. Johnston, deceased, is liable in his place and stead.

IV

That each of the said defendants should be subjected to the liability created by the Statute on the aforesaid facts, and upon such liability being ascertained that they be decreed to pay same to these plaintiffs, and such other creditors of said bank as may appear and establish their rights herein, and in this connection plaintiffs aver that in order to discharge and satisfy the obligations and debts of said bank it will be necessary that each of said shareholders be assessed and charged the full liability on his said stock, and such liability enforced herein.

[fol. 12] Wherefore, plaintiffs pray that an account be taken of the amounts due from each of said defendants to plaintiffs, and such other creditors as may appear and establish their rights herein, upon the basis of the number of shares of stock held and owned by said defendants at the time said bank went into voluntary liquidation in the manner aforesaid; and as to such of said shareholders as transferred their stock within sixty days (60) prior to the date of voluntary liquidation they, likewise, be held liable to the same extent as if they had made no such transfer to the extent that the subsequent transferee fails to meet such liability; that the court make and decree an assessment against each of said shareholders individually as provided by law; and that the plaintiffs have judgment against the said defendants individually for the amount shown to be due by said defendants; with interest thereon at six per-cent per annum from October 29, 1937, and for costs of suit, and for such other and further relief as to the court may seem proper, and as the law and equity may require.

Third Cause of Action

For their third cause of action herein and complaining of the defendants N. E. Crumpacker, C. F. Randolph, D. J. Oven, T. E. Vessels, R. L. Sanford, Albert Hirsch, Floyd

E. Felt, Kathryn Vessels, Faith W. Crumpacker, and Bess C. Felt, the plaintiffs allege and state:

I

That the plaintiffs, Ralph Crews, Charley Crews, Robert Crews, Everett Crews, and Amy Tresner, nee Crews, are citizens, residents and inhabitants of the State of Oklahoma, and the plaintiff Mary Willis, nee Crews, is a resident, citizen and inhabitant of the State of Oregon.

That the defendant, American National Bank of Enid, Oklahoma, is a banking corporation and association, duly organized under the laws of the United States, which corporation and association was and is located or established and domiciled at Enid, in the western federal district of Oklahoma.

That the defendants N. E. Crumpacker, C. F. Randolph, [fol. 13] D. J. Oven, R. L. Sanford, and Faith W. Crumpacker, are citizens, residents and inhabitants of the western federal district of Oklahoma, and defendants T. E. Vessels, Kathryn Vessels, Floyd E. Felt, Bess C. Felt, and Albert Hirsch, are non-residents of the State of Oklahoma, and not within the jurisdiction of this Court.

II

Plaintiffs hereby re-allege all the matters stated in paragraphs II, III, and IV in this Bill of Complaint preceding the first Cause of Action and said matters and allegations are hereby incorporated herein by reference to the same extent as if again specifically set forth at length herein, and in *accition* thereto plaintiffs further allege:

III

Plaintiffs further allege that at the date when said American National Bank ceased to carry on the banking business and went into voluntary liquidation the following named defendants were the duly elected, qualified and acting directors of said bank, viz: N. E. Crumpacker, C. F. Randolph, D. J. Oven, T. E. Vessels, R. L. Sanford, Albert Hirsch, Floyd E. Felt, Kathryn Vessels, Faith W. Crumpacker and Bess C. Felt, and they and each of them have ever since continued to be and still are the directors of said bank; that at the time said bank ceased to carry on the banking business and went into voluntary liquidation, and

continuously since said date, the said directors have been without authority to transact any business in the name of the bank except such as is incident to and implied in the duty of liquidation, and that the said directors thereupon became, have ever since continued to be and still are trustees for the creditors and stockholders of said bank, and as such trustees charged with the duty of collecting the outstanding indebtedness of the bank, converting into money the assets of said bank, and with the payment of the creditors of said bank equally and ratably so far as the assets prove sufficient, and, if any assets remain after all creditors be paid in full, then to distribute the remaining assets to the shareholders in said bank, and finally wind up and close the affairs of said bank.

[fol. 14] IV

Plaintiffs aver that during the time said bank was in process of liquidation there came into possession of said bank and under control of the hereinabove named directors for administration by them as trustees as aforesaid, the following assets and sums of money of said American National Bank, to-wit:

(A) The sum of $240,000.00 realized on and from the sale of certain assets to the First National Bank of Enid;

(B) Approximately $30,000.00 in notes, obligations, and securities, the detailed description of which is unknown to plaintiffs but well known to defendants and each of them, and which were later, and during the process of liquidation collected or sold or reduced to money in the sum of approximately $23,500.00;

(C) Approximately $15,000.00 recovered and collected from stockholders, being a part of the above-mentioned $240,000.00 which had previously been wrongfully distributed to stockholders;

and that the aforesaid assets and money, and every part thereof was charged and impressed with a trust as aforesaid and the aforesaid directors as trustees charged with the aforesaid duties in respect thereto.

V

Plaintiffs further aver that in violation of and in disregard of their duties as trustees the hereinabove named di-

rectors, defendants named in paragraph III above, did wrongfully and without reserving any money or assets with which to pay plaintiffs and other creditors of said bank, pay out and cause to be paid out and distributed among themselves, each of said directors being stockholders, and among the other stockholders, all of the said $240,000.00;

That said defendants in like violation and in disregard of their duties as trustees did wrongfully and without paying and distributing same equally and ratably among creditors, and without reserving any money or assets with which to pay other creditors of said bank, including plaintiffs, [fol. 15] did pay out and cause to be paid out, distributed and disbursed among various creditors of said bank, not including plaintiffs, and to the exclusion of plaintiffs, the other money and assets above mentioned, that is, the approximately $23,500.00 mentioned in sub-paragraph (B) above, and the approximately $15,000.00 mentioned in sub-paragraph (C) above, making an aggregate of $38,500.00 paid out and disbursed to other creditors to the exclusion of plaintiffs; and plaintiffs aver that the payment, disbursement and distribution of all of said money to stockholders and to creditors, as aforesaid, was all made during the course of voluntary liquidation of said American Bank and left and rendered said American Bank grossly insolvent and without any money or property to pay plaintiffs.

VI

Plaintiffs further aver that by reason of the foregoing the said defendants N. E. Crumpacker, C. F. Randolph, D. J. Oven, T. E. Vessels, R. L. Sanford, Albert Hirsch, Floyd E. Felt, Kathryn Vessels, Faith W. Crumpacker and Bess C. Felt, and each of them jointly and severally, became and are liable to plaintiffs for the full sum of $249,000.00 with interest and costs as aforesaid.

Wherefore, plaintiffs pray that an account be taken to ascertain and determine the exact amount received by said American National Bank during the process of liquidation and which came into the possession and under the control of said directors, the exact amount disbursed by them, the exact amount of their disbursements which they subsequently recovered from stockholders, and that the plaintiffs and such other creditors as may appear and establish their rights herein, have judgment against said N. E.

Crumpacker, C. F. Randolph, D. J. Oven, T. E. Vessels R. L. Sanford, Albert Hirsch, Floyd E. Felt, Kathryn Vessels, Faith W. Crumpacker and Bess C. Felt, and each of them, jointly and severally, for not less than the amount paid out and disbursed by said defendants, together with interest thereon at six per cent per annum from the date of disbursement thereof, no exceeding in all the sum of $249,000.00, with interest at six per cent from October 29 [fol. 16] 1937, plus $178.25 costs, and for the costs of this suit and for such other and further relief as to the Court may seem proper and as the law and equity may require.

A. F. Moss, H. R. Young, Christy Russell, M. F. Priebe, Solicitors for Plaintiffs.

EXHIBIT "A" TO BILL OF COMPLAINT

In the District Court of Garfield County, Oklahoma. Ralph Crews, Everett Crews, Robert Crews, Charley Crews, Amy Tresner, nee Crews, and Mary Willis, nee Crews, Plaintiffs, vs. American National Bank of Enid Oklahoma, a banking corporation, Defendant. No. 13,225.

Journal Entry

This cause coming on for trial this 5th day of October, 1937, plaintiffs appear in person and by attorneys, A. F. Moss, Christy Russel, and M. F. Priebe, and the defendant, the American National Bank of Enid, Oklahoma, N. E. Crumpacker, C. F. Randolph, and Joseph Meibergen, administrator with the will annexed of the estate of W. B. Johnston, deceased, appear in person and by their attorneys, P. C. Simons, H. G. McKeever, and Roy J. Elam. Whereupon, all parties announce ready for trial. The jury is duly empaneled to try said cause.

Whereupon, the plaintiffs upon introduction of evidence, and the taking of evidence not having been concluded the court rests from day to day and over the week end of each week and resumes the trial from day to day until finally on the 22nd day of October 1937 the plaintiffs rest.

Whereupon, the defendants, and each of them demur to the evidence of the plaintiffs, and upon consideration thereof the demurrers of the defendant N. E. Crumpacker, C. F. Randolph, and Joseph Meibergen, administrator with the

will annexed of the estate of W. B. Johnston, deceased, are by the court sustained and to the action of the court in sustaining said demurrer to the evidence, introduced on [fol. 17] the part and on behalf of the defendant N. E. Crumpacker, the plaintiffs object and excepts, and which exception is by the court hereby allowed, and to the action of the court in sustaining the demurrer upon the part and on behalf of the defendant C. F. Randolph the plaintiffs object and except, and which said exception is by the court hereby allowed, and to the action of the court in sustaining the demurrer of the defendant Joseph Meibergen, administrator with the will annexed of the estate of W. B. Johnston, deceased, the plaintiffs object and except and which said objection is by the court hereby allowed.

It Is Hereby by the Court Ordered, adjudged and decreed that the action of the plaintiffs against the defendants N. E. Crumpacker, C. F. Randolph, Joseph Meibergen, administrator with the will annexed of the estate of W. B. Johnston, deceased, is hereby by the court as to each of the last named defendants dismissed, and to the action and the judgment of the court dismissing said action as to the said defendant N. E. Crumpacker, and the said defendant C. F. Randolph, and the defendant Joseph Meibergen, as administrator with the will annexed of the estate of W. B. Johnston, deceased, the plaintiffs object, and except, and which said exception of the plaintiffs are hereby by the court separately allowed.

And It Is Further Ordered that the demurrer of the defendant, The American National Bank of Enid, Oklahoma, be and the same is hereby overruled, to which action of the court in overruling said demurrer the said defendant, American National Bank of Enid, Oklahoma, hereby objects and excepts and which said exception is by the court hereby allowed.

Whereupon said trial is resumed and the defendant, The American National Bank of Enid, Oklahoma, begins to introduce its testimony, and said testimony not having been concluded, and the hour of adjournment having arrived said cause is recessed over the week end, and thereafter said trial is resumed on October 26, 1937, pursuant to adjournment and trial is resumed and recessed from day to day until October 27, 1937, on which date all of the evidence having been concluded, all parties having rested, the court gives his instructions to the jury in writing at

[fol. 18] the conclusion of which said cause was duly argued by the respective parties and said cause was on the 28th day of October, 1937, duly submitted to the jury for consideration.

And that thereafter, and on October 29, 1937, the jury returned its verdict which was duly received, read, and recorded, and is as follows, to-wit:

"Verdict. In the District Court in and for Garfield County, State of Oklahoma. Ralph Crews, Everett Crews, Robert Crews, Charley Crews, Amy Tresner, nee Crews, and Mary Willis, nee Crews, Plaintiffs, vs. American National Bank of Enid, Oklahoma, a banking corporation, Defendant. No. 13,225.

We, the jury empaneled and sworn to try the issues in the above entitled cause, do upon our oaths, find for the plaintiffs and against the defendant, American National Bank of Enid, Oklahoma, and fix and assess the amount of plaintiff's recovery at the sum of $249,000.00.

E. W. Stuart, J. E. Davis, H. C. Metcalf, C. J. Boepple, Montie B. Johnson, J. H. Niehaus, W. S. Blevins, Sam Roads, Sam Petty, Victor Brakhage, Frank Hall, Foreman."

To which verdict and the rendition thereof the defendant, American National Bank of Enid, Oklahoma, objects and excepts, and which said exception is by the court hereby allowed.

And, Now, on this 29th day of October, 1937, it is by the court Ordered, Adjudged and Decreed that the plaintiffs, Ralph Crews, Everett Crews, Robert Crews, Charley Crews, Amy Tresner, nee Crews, and Mary Willis, nee Crews, do have and recover of, from and against the defendant American National Bank of Enid, Oklahoma, judgment in the sum of Two Hundred Forty Nine Thousand ($249,000.00) Dollars, and interest thereon from this date at the rate of six per cent per annum, together with the costs of this action, for all of which let execution issue, to which judgment the American National Bank of Enid, [fols. 19-50] Oklahoma, excepts and which said exception is by the court allowed.

O. C. Wybrant, Judge of the District Court.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF DEFENDANT M. C. GARBER—Filed September 21, 1942

Comes now the defendant in the above entitled cause, M. C. Garber, and for his separate answer to the bill of complaint of the plaintiffs filed herein, alleges and says:

1. That this court is without jurisdiction to hear and determine the subject matter of the first cause of action in [fol. 52] the bill of complaint of the plaintiffs and is without jurisdiction of an action such as is attempted to be set forth in the first cause of action of the bill of complaint.

2. That this court is without jurisdiction to hear and determine the subject matter of the third cause of action in the bill of complaint of the plaintiffs and is without jurisdiction of an action such as is attempted to be set forth in the third cause of action of the bill of complaint.

3. That the first and third causes of action of the plaintiffs in their bill of complaint filed herein should be dismissed by the court for want of jurisdiction.

4. Said defendant, M. C. Garber, alleges that the second cause of action set forth in the bill of complaint of the plaintiffs filed herein fails to state facts sufficient to constitute a valid cause of action in favor of the plaintiffs and against this defendant and for such reason this defendant requests the court to dismiss such cause of action as to this defendant.

5. This defendant further alleges that there is a misjoinder of causes of action in the bill of complaint of the plaintiffs in this action as to this defendant for the reason that this defendant is not made a party to the first cause of action and no claim is made against him therein and for the same reasons as to the third cause of action and for the further reason that as to the first cause of action this defendant is not claimed by the plaintiffs to have been a stockholder in the American National Bank of Enid, Oklahoma at the time that said bank received the sum of $240,000.00 therein referred to and disbursed the same to its stockholders and as to the third cause of action for the further reason that such third cause of action is against the defendants who are alleged to have been the Directors

of the American National Bank of Enid, Oklahoma at the time that it ceased to carry on a banking business and went into voluntary liquidation and such third cause of action is based upon alleged mismanagement on the part of said Board of Directors of the American National Bank of Enid, Oklahoma in the matter of the liquidation of the business and affairs of such bank, and this defendant, not being one of the Directors of said bank, is not a party to such third [fol. 53] cause of action nor in any manner affected thereby, and which cause of action is wholly unrelated to and foreign to the pretended cause of action alleged against this defendant in the second cause of action of the bill of complaint of the plaintiffs herein. This defendant, therefore, requests the court to dismiss the bill of complaint of the plaintiffs on account of such misjoinder of causes of action.

6. Said defendant, M. C. Garber, further pleading and for his answer to the second cause of action in the bill of complaint of the plaintiffs, admits that he is a citizen and resident and inhabitant of the Western Federal District of the State of Oklahoma, and alleges that he has been a resident of Garfield County, in the State of Oklahoma at all times involved in this action, and still is.

7. Defendant admits that the American National Bank of Enid, Oklahoma, was a banking corporation and association organized under the laws of the United States, and alleges that it commenced operations as a national bank about the month of January, 1920, with its banking house and place of business at Enid in Garfield County, and that it continued to engage in the banking business as an active and going concern until November 25, 1929, when it voluntarily discontinued its banking business as hereinafter more particularly set forth.

8. Further pleading, this defendant denies that, at the time the said American National Bank of Enid, Oklahoma, ceased to carry on a banking business on or about November 25, 1929, it was then insolvent and for a long time prior thereto had been insolvent, and that it ever since has been and still is insolvent, but, on the contrary, alleges that, at the time when the American National Bank ceased to carry on a banking business, on or about November 25, 1929, that it was a solvent and going concern and possessed assets more than sufficient to pay all of its contracts, debts and

engagements then known or existing, and was able to meet all of its obligations.

That by reason of the number of banks then engaged in transacting the business of banking in the City of Enid, the stockholders of the American National Bank on and shortly prior to November 25, 1929, determined to sell the [fol. 54] business and a portion of the assets of such bank, and discontinue the banking business, and pursuant thereto, and on November 25, 1929, said American National Bank of Enid entered into a written contract with the First National Bank of Enid, Oklahoma, a national banking association, wherein and whereby said American National Bank sold a part of its assets to the First National Bank of Enid, and in consideration therefor said First National Bank of Enid, Oklahoma, agreed to and did assume the liability of said American National Bank of Enid to its depositors, including all individual deposits, all certificates of deposit, and all savings deposits; also, all amounts due by American National Bank to banks, bankers and trust companies, all certified checks, and cashiers' checks, all bills payable and rediscounts, and all interest on said items of said American National Bank, all as more particularly set forth in the written contract between said banks. That pursuant thereto and at the close of business on November 25, 1929, said First National Bank of Enid, Oklahoma, did take over the active banking business of said American National Bank of Enid, Oklahoma, and said American National Bank of Enid, Oklahoma, thereupon, discontinued the active banking business and its business from that date thenceforth was taken over by said First National Bank of Enid, Oklahoma. That, in addition to assuming the obligations of the American National Bank as above set forth, said First National Bank of Enid agreed to pay to said American National Bank of Enid certain sums of money, which was later on done by said First National Bank of Enid, Oklahoma and such money was used and applied by the officers and directors of said bank for the purpose of reimbursing the stockholders of such bank for the amount of their original investment in said stock together with their proportionate part of the surplus of such bank, no part of which was received by this answering defendant, M. C. Garber, as he was not a stockholder of or in said American National Bank of Enid, Oklahoma, on November 25, 1929, at the time when it ceased transacting business as a bank.

9. This defendant, M. C. Garber, further pleading, alleges and says that, prior to November 14, 1929, he had been the owner of 125 shares of the capital stock of said American National Bank of Enid, Oklahoma, of the par [fol. 55] value of $100.00 each, but that prior to said date of November 14, 1929, D. J. Oven of Enid, Oklahoma, negotiated with this defendant for the purchase of all of said shares of stock in the American National Bank of Enid, Oklahoma, and that pursuant to such negotiations this defendant did sell, transfer and assign to the said D. J. Oven, who was one of the directors of such bank, all of said shares of stock of the American National Bank of Enid, Oklahoma, so owned by this defendant, and delivered the certificate or certificates of stock therefor to the said D. J. Oven, who caused the same to be transferred to himself upon the books of the American National Bank of Enid, Oklahoma, on said date of November 14, 1929, and a new certificate of stock therefor issued to himself, the said D. J. Oven.

That such sale was made by this defendant, M. C. Garber, to the said D. J. Oven in good faith for a valuable consideration more than sixty days next before the date of the failure of the American National Bank of Enid, Oklahoma, to meet its obligations, or any of them, and was made without any knowledge on the part of this defendant of any impending failure of the American National Bank.

Defendant further pleading alleges that said American National Bank of Enid, Oklahoma, never did fail as a bank, but on the contrary was a solvent and going concern with ample assets to meet all of its contracts, debts and engagements, and ceased to transact business voluntarily, because the stockholders of said bank desired to discontinue the business of such bank on account of the crowded condition of the banking business in the City of Enid, and the belief on their part that there were more banks in Enid than the field for banking business in this city justified.

10. Defendant further pleading alleges and says that following the sale of a part of its assets and the transfer of its business to the First National Bank of Enid, Oklahoma on November 25, 1929, the said American National Bank of Enid, Oklahoma went into voluntary liquidation, as provided by Sections 5220 and 5221, Revised Statutes of the United States, and for such purpose, and on December 20, 1929, a meeting of the stockholders of the American

National Bank of Enid, Oklahoma, was duly and regularly held, at which meeting the stockholders of said bank re- [fol. 56] solved to put such bank in voluntary liquidation, and for such purpose elected T. E. Vessels as liquidating agent of such bank, and he gave bond and qualified as provided by the laws of the United States, and thereafter acted as a liquidating agent of such bank in winding up the business and affairs of such bank, all as provided by law.

That the action referred to in Paragraph 4 of the bill of complaint was not commenced by the plaintiffs until December 16, 1931, and that the American National Bank of Enid had no knowledge, notice or information to the effect that the plaintiffs asserted any such claim against said American National Bank of Enid, Oklahoma, prior to the filing of such action in the District Court of Garfield County, Oklahoma, and had no knowledge, information or notice of any kind or character that any such claim would ever be asserted against said bank at the time it voluntarily discontinued business on November 25, 1929, or at the time it went into voluntary liquidation on December 20, 1929, or thereafter, prior to the filing of such action. That such action was permitted by the plaintiffs to remain pending in the District Court of Garfield County, Oklahoma until it was finally brought on for trial on October 5, 1937, nearly six years after the commencement of said action.

That in said action the plaintiffs in their original and amended petition filed therein brought suit against T. E. Vessels, Floyd E. Felt, Albert Hirsch, N. E. Crumpacker, C. F. Randolph, W. B. Johnston and American National Bank of Enid, Oklahoma, a corporation, as defendants; that in said action the plaintiffs, in substance, alleged that pursuant to an agreement made and entered into on June 13, 1922, between them and the Garber Refining Company of Garber, Oklahoma, that the Farmers State Bank of Garber, Oklahoma, was designated as an escrow agent for the purpose of receiving the funds received from the sale of oil and gas produced from certain lands, the oil and gas lease upon which was in litigation between the plaintiffs and the Sinclair Oil and Gas Company, and which lands were being developed for oil and gas produced by the plaintiffs, and the oil produced therefrom was to be sold to the Garber Refinery and the proceeds of the 7/8 interest of the lessee therein deposited in said Farm-

[fol. 57] ers State Bank of Garber, Oklahoma, pending the outcome of such litigation, and except for certain expenditures to be made therefrom the moneys so paid to the Farmers State Bank of Garber were to be by it invested in United States Bonds, and such bonds held by said Farmers State Bank of Garber, Oklahoma, as escrow agent, pending the outcome of such litigation; that as the result of such arrangement that a large amount of money was received by the Farmers State Bank of Garber and invested in Government Bonds and that such bonds, or the proceeds of the sale thereof were misappropriated by the Farmers State Bank of Garber, Oklahoma, and the officers of said bank; that the Farmers State Bank bought and sold some of such bonds through the facilities of the American National Bank of Enid, Oklahoma, its corresponding bank, and claimed that T. E. Vessels and Floyd E. Felt, who were officers of the American National Bank of Enid, Oklahoma, aided and abetted the officers and representatives of the Farmers State Bank of Garber, Oklahoma, in misapplying some of said bonds and the proceeds of the sale thereof, all of which acts, if true, would constitute personal torts and wrongful acts on the part of the said T. E. Vessels and Floyd E. Felt.

That in said action no service of summons was had upon the defendants, T. E. Vessels and Floyd E. Felt, and they did not become actual parties to such action. In such action it was claimed by the plaintiffs that the defendants, T. E. Vessels, Floyd E. Felt, Albert Hirsch, N. E. Crumpacker, C. F. Randolph and W. B. Johnston, were the directors of the American National Bank of Enid, Oklahoma, and that they had knowledge of and consented to the alleged wrongful acts of the said T. E. Vessels and Floyd E. Felt, and the plaintiffs sought to recover judgment in such action against such individual directors for the alleged wrongful acts of the said T. E. Vessels and Floyd E. Felt, as officers of said bank; that in said action no service of summons was had upon the defendant, Albert Hirsch, and he did not become an actual party to such action.

That service of summons was had upon the defendants, N. E. Crumpacker, C. F. Randolph and W. B. Johnston; that prior to the trial of said cause the said W. B. Johnston [fol. 58] died, and Joseph Meibergen, administrator with the will annexed of the estate of W. B. Johnston, deceased, was substituted in his place and stead as a defendant in said ac-

tion, and said action proceeded to trial against the two directors above named, N. E. Crumpacker and C. F. Randolph, and against the administrator with the will annexed of the estate of the said W. B. Johnston, deceased; that as shown by the journal entry of the proceedings in said cause attached to the bill of complaint of the plaintiffs herein, the plaintiffs failed in said action as to the individual directors, and failed to make out a case against them, and upon the conclusion of the evidence of the plaintiffs in said action the court sustained a demurrer to the evidence of the plaintiffs as to the said defendants and dismissed said action as to them, leaving the action to proceed against the American National Bank of Enid, Oklahoma, as sole defendant, resulting as shown by the journal entry in said cause in a verdict and judgment against the sole defendant, American National Bank of Enid, Oklahoma, for the sum of $249,000.00.

11. This defendant, further pleading, alleges and says that the judgment which the plaintiffs are seeking to enforce in this action is not such a judgment as they are entitled to enforce and collect from the stockholders of the American National Bank; that such judgment, should it become final, was recovered by the plaintiffs upon and by reason of the alleged wrongful, personal acts of the said T. E. Vessels and Floyd E. Felt, and of which alleged wrongful acts this defendant, as a stockholder in the American National Bank, had no knowledge, and in which he did not participate, and for which he is not liable; that upon the trial of said cause the individual directors of said bank were exonerated from any liability for the alleged wrongful acts of the said T. E. Vessels and Floyd E. Felt; that such alleged wrongful acts and the judgment based thereon do not constitute a contract, debt or engagement of the American National Bank, as a banking corporation, under the laws of the United States, and do not come within the liability cast upon stockholders in a national banking association.

12. Defendant further pleading alleges that at no time [fol. 59] prior to the institution of this action nor until now has there been an adjudication by the comptroller of the currency of the insolvency of the American National Bank of Enid, Oklahoma, nor has there been any order made by the comptroller of the currency, levying an assessment against the stockholders of the American National Bank of Enid,

Oklahoma, each of which is a condition precedent to the maintenance of this action and of any recovery by the plaintiffs against this defendant by reason of his alleged liability as a stockholder in said bank and for which reason this action cannot be maintained by the plaintiffs and should be dismissed.

13. This defendant further alleges that the alleged cause of action of the plaintiffs against this defendant in the bill of complaint filed herein is barred by the statute of limitations of the State of Oklahoma, which provides that an action upon a liability created by statute must be commenced within three (3) years after the cause of action shall have accrued, and not afterwards, and that by analogy such statute of limitations is applicable in this cause, and constitutes laches upon the part of the plaintiffs, and that they have been guilty of laches in instituting this action against this defendant, and that such action is barred by reason of such laches, and by reason of the statute of limitations of the State of Oklahoma, and cannot be maintained by the plaintiffs against this defendant.

14. Said defendant further pleading alleges that in equity the plaintiffs have been guilty of laches in the bringing of this action, and that by reason of all the facts hereinbefore set forth plaintiffs should not be permitted to maintain this action against this defendant, and that said action should be dismissed by reason of the laches of the plaintiffs.

15. Defendant further pleading alleges that, at the time when he sold, transferred and assigned all of his shares of stock in the American National Bank of Enid to D. J. Oven as set out in paragraph 9 of this answer that said American National Bank was a solvent and going concern, and at the time of such sale of his stock this defendant had no knowledge or information of or concerning the sale which was thereafter made of the business and a part of the assets of such bank to the First National Bank of Enid, [fols. 60-104] Oklahoma, or of any intention on the part of the American National Bank of Enid so to do.

Defendant further pleading alleges that all of his liability as a stockholder of and in the American National Bank of Enid, Oklahoma, terminated and ended with and upon the sale of all of his shares of stock in such bank to the said D. J. Oven.

Wherefore, this defendant having fully answered prays that the plaintiffs take nothing by this action against this defendant and that this action be dismissed as to him, and that he go hence without day, and recover his costs herein expended.

P. C. Simons, Solicitors for Defendant, M. C. Garber. Simons, McKnight, Simons, Mitchell & McKnight, of Counsel.

[File endorsement omitted.]

[fol. 105] IN UNITED STATES DISTRICT COURT

STATEMENT OF MATTERS STIPULATED—Filed March 2, 1943

Pursuant to the direction of the court for the parties hereto to summarize and stipulate as to as many of the facts as possible in this action, in order to facilitate the examination of the record by the court, it is hereby stipulated and agreed between the plaintiffs and the appearing defendants that to the extent hereinafter set forth that the matters and things hereafter set forth shall be taken as agreed upon, as agreed facts in this case, reserving to each of the parties hereto the right to supplement the same by any other additional facts or things agreed upon either at the pre-trial conference in this case or at the trial thereof before the court on February 24, 1943, as appearing in and by the transcript of the record of such pre-trial conference and such trial as made by the Court Reporter. Each party hereto shall have the right to file in addition hereto, a statement containing additional matters agreed upon or appearing in the record at such pre-trial conference or at the trial of this case, in order to assist the court in examining the record in this case.

1. That at the time this action was commenced, all of the plaintiffs were citizens and residents of the Western District of Oklahoma, except the plaintiff, Mary Willis, nee Crews, who was a citizen and resident of the state of Oregon.

2. That the defendant, American National Bank of Enid, Oklahoma, is a banking corporation and association duly organized under the laws of the United States, which cor-

[fol. 106] poration and association was and is located or established and domiciled at Enid, in the Western District of Oklahoma.

3. That at the time this action was commenced, the following individual defendants were citizens and residents of the Western District of Oklahoma, viz: N. E. Crumpacker, Faith W. Crumpacker, G. E. Hudson, G. E. Munger, Florence Gannon Lovell, Ruth Munger, nee Gannon, Katie Gannon, C. F. Randolph, R. L. Sanford, M. C. Garber, Glowrene Gentry Hoehn, J. M. Gentry, D. J. Oven, R. R. Kisner and B. Denker.

4. That at the time of the commencement of this action and at all times since the following persons, named as defendants, but on whom no service has been had, were and are non-residents of the State of Oklahoma, and no personal service of process could be had on them herein, viz: T. E. Vessels, Kathryn Vessels, Floyd E. Felt, Bess C. Felt and Albert Hirsch.

5. That at the time of the commencement of this action and at all times since the following viz:

(a) Persons named as defendants, but on whom no service has been had, were and are non-residents of the State of Oklahoma, and no personal service of process could be had on them herein, to-wit: Ed Klein, Max Hirsch, Morris Hirsch, Joseph Weil, Helen Walker King, nee Walker, Louis H. Walker, Herman A. Walker, Theodore C. Walker, Lydia C. Walker, Malinda M. Walker, Henry Walker, F. C. Klosner.

(b) Persons named as defendants and served but have since died and there has been no revivor, viz: E. M. Abbott.

(c) That C. Brumfield, named as defendant, died prior to the time this suit was filed.

6. That the American National Bank of Enid, Oklahoma, ceased to carry on a banking business on or about November 25, 1929, and on said date sold and disposed of to First National Bank of Enid substantially all of its assets, save and except the money it received for its assets, and on or about said date went into voluntary liquidation under the laws of the United States pertaining to National [fol. 107] Banks; that the contract of sale is identified as

plaintiff's Exhibit 1, and is in evidence. That under Exhibit 1, the American National Bank received:

(a) The disclaimer mentioned therein, which was credited as $10,000; and

(b) $240,000 in cash.

(c) That the $100,000. specified in said contract to be payable subject to and under the guaranty clause, never became due or payable and was not paid, by reason of the fact that the amount guaranteed was not realized from property sold.

(d) That the American National Bank was required to and did pay back to the First National Bank of Enid to fulfill its guarantee under the above sale contract, the sum of $30,000.00. Additionally, five shareholders of the American National Bank of Enid, as hereafter specified in paragraph 13 hereof, paid an additional $8,591.48 to fulfill said guarantee.

(e) In respect to the assets pledged as security for a loan of $30,000.00 (being the $30,000.00 obtained and used by the American National Bank to pay the above $30,000.00 to make good the guaranty to the First National Bank of Enid) obtained about July 28, 1930; that subsequently such property so pledged was collected in part and the proceeds derived from such sale were applied on the payment of such $30,000.00 indebtedness for which it was pledged; that the part not collected was about February 15, 1932, sold for $435.00 which sum was likewise applied on the $30,000.00 indebtedness for which it was pledged. In addition to (1) the amount collected, as above mentioned, and (2) the amount realized from the sale of pledged assets, as above mentioned; (3) certain of the stockholders contributed back to the American National Bank of Enid the sum of $16,621.66 (being a part of what had previously been paid to such stockholders as a dividend by the American National Bank of Enid, and the shareholders so refunding same are hereafter tabulated in an itemized list set out as paragraph 12 hereof), and such items, (1) (2) and (3), discharged the $30,000.00 indebtedness created to raise the $30,000.00 above borrowed to pay the guarantee to the First National [fol. 108] Bank of Enid and the above disposed of all the property of the American National Bank of Enid, except the

item of $240,000.00 cash, above mentioned, the disposition of which $240,000.00 is shown by the next succeeding paragraph hereof—number 7.

7. That the above $240,000.00 cash received by the American National Bank of Enid was, by the American National Bank of Enid, in the month of December, 1929, in pursuance of direction so to do by the board of directors of said bank, paid out and distributed to and received by the shareholders in the American National Bank of Enid, the amount paid to and received by each shareholder being $120.00 per share for the shares owned by him and which shares and such ownership is listed on page 11 of the Bill of Complaint herein, except that in said list, N. E. Crumpacker is listed as owning 251 shares, whereas it should be 200 shares listed to him, and D. J. Oven is listed as owning 519 shares and it should be 570 shares listed to him, that such list on page 11 of the Bill of Complaint, with such two corrections as stated, is the record ownership of the stock in such Bank on November 25, 1929, and also on the date of the distribution of such $240,000.00, and, as corrected is as follows:

Owner of Shares	Number of Shares
N. E. Crumpacker	200
Joseph Weil	15
E. M. Abbott	10
R. L. Sanford	15
C. Brumfield	10
Floyd E. Felt	30
R. R. Kisner	10
Burchard Denker	20
T. E. Vessels	129
Charles K. Walker	20
R. D. Anderson	10
G. E. Hudson	10
Max Hirsch	98
Albert Hirsch	98
Morris Hirsch	96
Ed Klein	100
G. E. Munger	16
Florence Gannon Lovell	21
[fol. 109]	
F. C. *Kbssner*	10
Clara M. Oven	45

Owner of Shares	Number of Shares
John J. Vater	5
C. E. Gannon	130
George B. Roberts, Trustee	18
Eugene Watrous & Irene Watrous	90
D. J. Oven	570
Kathryn Vessels	30
Bess C. Felt	10
Faith W. Crumpacker	25
J. M. Gentry	27½
Glowrene C. Hoehn	27½
C. F. Randolph	80
Mrs. W. B. Johnston	26

8. That all the facts stated in paragraph numbered, under Roman numerals, III and IV, appearing on pages 4 and 5 of the Bill of Complaint are admitted, and in this connection it is further admitted: (A) that in June, 1942 another execution was duly issued on the above judgment and duly returned wholly unsatisfied and endorsed "no property found"; (B) that the total amount of court costs accrued on said judgment is the sum of $78.10; (C) that there are no creditors of the American National Bank of Enid other than the plaintiffs in this case; (D) that the following documents, identified as plaintiffs' Exhibits — to —, are the Amended petition; Answer, Reply, Instructions to the Jury; and Journal Entry of Judgment in the State Court, wherein plaintiffs obtained the $249,000.00 judgment which is the basis of this action; and such exhibits are offered in evidence; and it is, also, agreed that the opinion of the Supreme Court of Oklahoma, in case No. 28650, entitled American National Bank of Enid, Oklahoma, v. Ralph Crews, et al., reported in 126 Pac. (2d) 733, may be considered as in evidence herein.

9. That C. E. Gannon died testate on December 4, 1934, and that a copy of his will has been filed as an exhibit, heretofore referred to. That G. E. Munger, et al was duly appointed executors of his will and that his heirs and devisees are set forth in said will. That the devisees in said [fol. 110] will, other than Katie Gannon, Florence Lovell and Ruth Munger, were not in fact distributed any part of the estate of C. E. Gannon, deceased; that the bequests made by said will to others than Katie Gannon, Florence Lovell and Ruth Munger, were paid by said last three persons.

That plaintiffs did not file their claim in the estate of C. E. Gannon for payment covering the claims sued on in this action. That a report was made covering inheritance and gift taxes, a copy of which is to be filed as an exhibit in this case, together with receipts showing payment of the taxes assessed by the United States Government.

That there is filed in this cause as Exhibit —, a photostatic copy of the bank account in the First National Bank of Enid, Oklahoma, of C. E. Gannon, which discloses the deposit of $15,600.00 on December 11, 1929, and all deposits and withdrawals from that date to September 22, 1930.

That on December 11, 1929, C. E. Gannon, received the sum of $15,600.00 covering a payment made to him by the liquidating agent of the American National Bank for 130 shares of the capital stock of the American National Bank at $120.00 per share. That thereafter and on January 20, 1930, he made an assignment to T. E. Vessels for said 130 shares and also, at the same time, took an assignment of 16 shares of said stock then owned by G. E. Munger and 21 shares of stock then owned by Florence Lovell, and assigned all of said stock to T. E. Vessels, and as a consideration therefor, took the personal note of T. E. Vessels for $2,500.00 due one year after date at six per cent (6%) per annum. That on January 22, 1930, C. E. Gannon paid to G. E. Munger for his interest in said note the sum of $154.07 and on January 22, 1930, paid to Florence Lovell for her interest in said note the sum of $137.00.

That a list of the properties transferred by C. E. Gannon, Exhibits — and — and introduced in evidence by the plaintiff, were executed by C. E. Gannon in his lifetime and the origin of the ownership of such property in C. E. Gannon is explained in a statement relative to each property filed by the defendants, G. E. Munger, Ruth Munger and Florence Lovell, marked Exhibit —. That in said list of deeds marked Exhibits — to —, there are four properties which did not belong to C. E. Gannon in his lifetime, to-wit:

[fol. 111] No. 14. A One-half (½) interest in Lot Sixteen (16) and Seventeen (17) in Block Twenty-eight (28) Portland Place Addition to Enid, Oklahoma.

No. 1. Lots Five (5) to Eight (8) inclusive in Block Fourteen (14) Jonesville Addition to the City of Enid, Oklahoma, owned by Katie Gannon and acquired by her September 20, 1909.

No. 2. A one-half (½) interest in Lot Twenty (20) Block Twenty-seven (27) Jonesville Addition to the City of Enid, acquired by Katie Gannon and Florence Lovell for $20,000.00 on August 8, 1935.

No. 4. Lots One (1), Two (2) and Three (3) in Parkview Addition to the City of Enid, acquired by L. L. Lovell prior to September 17, 1930, and on September 17, 1930, transferred to Katie Gannon.

There is also one property listed as an exhibit which was transferred to Ruth Willard Munger and Ruth Willard Munger is not one of the defendants in this action.

10. That Katie Gannon died intestate May 24, 1941, and that Florence Lovell was duly appointed administratrix of her estate and qualified June 25, 1941.

That certified copies of the court proceedings are on file in this cause. That the sole heirs of Katie Gannon are Florence Lovell and Ruth Munger, who inherited such estate in equal parts.

It is agreed that each of said heirs received from said estate in the excess of $25,000.00 in money and property.

That the plaintiffs herein did not file a claim in the estate of Katie Gannon, deceased, for the payment of the cause of action sued on in this action.

11. That Clara M. Oven died March 9, 1937; that her estate was duly probated in Garfield County, Oklahoma; that her sole heir was the defendant, D. J. Oven who inherited her entire estate; that the inventory and appraisement of her estate is identified as "Exhibit —" and the final decree is identified as "Exhibit 7", which exhibits are offered in evidence and that D. J. Oven, as her sole heir, received in money and property from said estate approximately the [fol. 112] amount and value shown in such exhibits. That plaintiffs filed no claim in the Clara M. Oven estate; that none of the money received by Clara M. Oven from the liquidating dividend was used to acquire any of the property listed in her estate.

12. That of the amount distributed to the stockholders as shown in paragraph 7, above, the following persons paid back and restored to the American National Bank of Enid the amounts as follows, to-wit:

C. E. Gannon	$ 697.00
R. R. Kisner	53.61

G. E. Munger	85.78
G. B. Roberts, Trustee	96.50
C. Brumfield	53.61
Florence Lovell	112.70
J. D. Oven	7,415.26
R. L. Sanford	223.72
C. F. Randolph	1,193.18
Eugene Watrous	442.33
Clara Oven	990.62
John Vater	24.57
Glowrene Gentry Hoehn	410.15
J. M. Gentry	410.15
Albert Hirsch	481.65
N. E. Crumpacker	3,233.61
R. D. Anderson	49.14
Burchard Denker	98.29
Olive Johnston	127.78
E. M. Abbott	49.14
Faith W. Crumpacker	372.87
Total	$16,621.66

13. That on or about March 25, 1932, the following stockholders of the American National Bank of Enid, paid to the First National Bank of Enid to apply on the guarantee under the sale contract identified as plaintiff's Exhibit 1, the following amounts, to-wit:

[fol. 113]

D. P. Oven	$ 1,718.30
R. L. Sanford	1,718.30
C. F. Randolph	1,718.29
N. E. Crumpacker	1,718.29
Albert Hirsch	1,718.29
Total	$ 8,591.48

which amount is in addition to the $16,621.66 mentioned in preceding paragraph.

14. That pages 279 to 290 of the minute book of American National Bank of Enid are identified as plaintiff's Exhibit 8, being minutes of various meetings of stockholders, or of directors, of American National Bank of Enid, held on the dates indicated and such Exhibit 8 is offered in evidence.

15. That on November 14, 1929, the defendant, M. C. Garber, for a valuable consideration sold and delivered to the defendant, D. J. Oven, his stock in the American National Bank of Enid, being 125 shares, and the certificate evidencing the same was duly endorsed by the said M. C. Garber and transferred to the said D. J. Oven; that such certificate was duly surrendered to the American National Bank of Enid and a new certificate, being Certificate No. 100, for such 125 shares of stock was, on November 14, 1929, issued and delivered to the said D. J. Oven; that on November 14, 1929, and up to November 25, 1929, the date the American National Bank of Enid sold its business and assets to the First National Bank of Enid, the American National Bank of Enid was a solvent and going concern, not taking into consideration and excluding the claim of the plaintiffs in this case, upon which they filed suit on December 16, 1931, and which claim was subsequently reduced to judgment in that action and is the $249,000 judgment which is the basis of this action; that the circumstances of such sale of his stock by the said M. C. Garber to the said D. J. Oven were that a few days prior to November 14, 1929, the said D. J. Oven went to the said M. C. Garber, and sought to purchase from him his stock in the American National Bank. That the said M. C. Garber thereupon told him that he would take the matter under consideration and advise him later. That [fol. 114] a few days later the said D. J. Oven again saw the said M. C. Garber, and the said M. C. Garber advised him that he had considered the matter and concluded that if the said D. J. Oven would buy his stock in the American National Bank and also some stock which he owned in the American National Mortgage Company and the American Building Company so as to clean up his investment in all these companies, that he would sell provided that they could agree upon the price.

That they thereupon did agree upon the price for the stock of the said M. C. Garber in the American National Bank and in the other companies mentioned, the total price for all being $25,625.00. That the sale was consummated on November 14, 1929, and the said D. J. Oven paid him for such stock by giving him a check for $625.00 and five promissory notes for $5,000.00 each due at intervals and which notes were paid before they became due in the month of December 1929.

That it shall be considered that, subject to objection as to its competency, relevancy and materiality by plaintiffs, the defendant, M. C. Garber, testified: that at the time of such negotiations and of the consummation of the sale of such stock by M. C. Garber to D. J. Oven, on November 14, 1929, the said M. C. Garber had no information to the effect that the American National Bank contemplated selling its assets and business to the First National Bank and going out of business, and that at such time the defendant, M. C. Garber knew nothing of any claim by the plaintiffs against the American National Bank and believed the American National Bank to be fully solvent at such time, and had no knowledge of any impending failure of the American National Bank, and the sale of his stock by the said M. C. Garber was made in good faith and without any intention of trying to avoid liability as a stockholder in such bank.

That as to the defendants, R. L. Sanford, N. E. Crumpacker, C. F. Randolph and D. J. Oven, who were directors of said American National Bank at the time it sold its assets and business to the First National Bank of Enid, on November 25, 1929, and who thereafter continued to act as such directors in the liquidation of the business of such [fol. 115] bank, it is stipulated that at the time the $240,000 was disbursed and returned to the stockholders of the American National Bank that no claim had been asserted by these plaintiffs against the American National Bank and that said defendants shall be considered as having testified subject to objection by plaintiffs as to its competency, relevancy and materiality, that they had no knowledge or notice of any such claim and that said defendants had no personal knowledge of any such claim until subsequent to the disbursement of said $240,000.00.

That the following named defendants sold, transferred and delivered their stock in the American National Bank to T. E. Vessels, who is still the president of such bank, for a valuable consideration on the following dates, to-wit:

C. E. Gannon, January 20, 1930;
Florence Gannon Lovell, January 20, 1930;
G. E. Munger, January 20, 1930;
R. L. Sanford, January 19, 1931;
G. E. Hudson, about November 1930;
N. E. Crumpacker, December 14, 1930;
Faith W. Crumpacker, December 14, 1930;
C. F. Randolph, about January, 1931;

Glowrene Gentry Hoehn, —— —, 1930;
J. M. Gentry, —— —, 1930;
D. J. Oven & Clara M. Oven, December, 1930.

That at such times all of said defendants endorsed their certificates of stock and delivered them to the said T. E. Vessels who was still the president of such bank to be by him transferred upon the books and records of the bank.

The sale of such stocks as above set forth, was evidenced by the letter dated February 6, 1943, written by counsel for said defendants, to the Clerk of this Court in keeping with the directions of the court.

That the printed copies of the amended petition, separate answer of the American National Bank, reply of plaintiffs to the separate answer of the American National Bank, the given instructions of the court in said cause, omitting the statement of the case, the motion of the defendant, American National Bank for a new trial, the journal entry of the proceedings upon the trial of said cause and the overruling [fol. 116] of the motion of the defendant and of the plaintiffs in said cause for a new trial, all in case No. 13,225, entitled Ralph Crews, et al., Plaintiffs v. T. E. Vessels, et al., Defendants, being the action in which the plaintiffs recovered the judgment sought to be enforced in this case and which were transmitted to the Clerk of this Court by letter from counsel for said defendants, dated February 4, 1943, and which were so transmitted and filed in keeping with the order made by this court at the pre-trial conference, shall be considered as being offered and introduced in evidence in this case. That the transcript of the administration proceedings in the estate of C. E. Gannon, deceased, in the County Court of Garfield County, Oklahoma, duly certified by the Court Clerk of Garfield County, containing copies of the letters testamentary, the general inventory and appraisement, the notice to creditors, proof of posting publication thereof, and the final decree in said estate together with the certified copy of the last will and testament of the said C. E. Gannon, deceased, and the transcript of the proceedings in the matter of the estate of Katie Gannon, deceased, in the County Court of Garfield County, Oklahoma, duly certified by the Court Clerk, containing copies of the letters of administration, inventory and appraisement, notice to creditors, proof of posting and publication thereof and the final decree in said estate shall be treated and considered as offered and introduced in evidence in this cause,

having been transmitted to the Clerk of this court by counsel for said defendants by letter of February 6, 1943, pursuant to the order made by this court at the pre-trial conference.

16. That on November 25, 1929, and continuing thereafter until subsequent to the distribution to the stockholders of the $240,000.00, the following named persons were the duly elected, qualified and acting directors of American National Bank of Enid, viz: N. E. Crumpacker, C. F. Randolph, D. J. Oven, T. E. Vessels, R. L. Sanford, Albert Hirsch, Floyd E. Felt, Kathryn Vessels, Faith W. Crumpacker and Bess C. Felt, and that such persons continue to be the directors of the American National Bank *oof* Enid up to this date, except that the defendant, Faith W. Crumpacker denies that she ever functioned as a member of the Board of Directors and [fol. 117] D. J. Oven asserts that he ceased to be a director in December, 1930, and this paragraph of the stipulation is without prejudice to the above denial by Faith Crumpacker and without prejudice to the above assertion by D. J. Oven.

It is further agreed that Faith W. Crumpacker took the oath of office as director on November 25, 1929.

17. That since this action was commenced plaintiffs have made settlements (all of which were approved by the court herein, and are of record and on file in this action) with the following defendants and on the dates and amounts as follows:

Date	Name	No. of Shares	Amount
February 7, 1938	Eugene & Irene Watrous	90	11,250.00
February 7, 1938	John Vater	5	625.00
February 7, 1938	Mrs. W. B. Johnston	26	3,250.00
February 21, 1938	W. B. Johnston Estate—Secondary Liab. on 64 Shares		4,000.00
September 26, 1939	(Roberts estate, which includes: George B. Roberts, as Trustee, George B. Roberts, Max M. Roberts, Bess R. Nelson and Margaret Van Dyne)	18	
March 22, 1940	(Albert Hirsch Max Hirsch Morris Hirsch)	292	33,750.00

which sums were received by plaintiffs and applied on the dates stated, first to the interest accrued down to date received, then the balance was applied on the principal amount of the judgment.

That the 64 shares on which settlement was made of the secondary liability of the W. B. Johnston, are included in the 570 shares owned by D. J. Oven on November 25, 1929.

18. That the $249,000.00 judgment sued on has been duly listed and assessed for taxation and the intangible tax paid thereon for the years 1940, 1941 and 1942 as required by the laws of Oklahoma.

[fols. 118-122] 19. That as to the property embraced in exhibits 100 to 105 inclusive, the reasonable market value of the property was the amount at which it was valued for assessment, which values are as noted on the back side of each of such exhibits; and that C. E. Gannon continued to pay the taxes on such property down to and including the year 1934.

Each party reserves the right to submit to the court suggested findings of fact to supplement the foregoing agreed facts.

A. F. Moss, Christy Russell, M. F. Priebe, Attorneys for Plaintiffs. Simons, McKnight, Simons, Mitchell & McKnight, by P. C. Simons, Attorneys for Florence Gannon Lovell, G. E. Munger, Florence Lovell, Administratrix of the Estate of Katie Gannon, deceased, R. L. Sanford, G. E. Hudson, N. E. Crumpacker, Faith W. Crumpacker, C. F. Randolph, M. C. Garber and Ruth Munger, nee Gannon.

W. J. Otjen, Harry O. Glasser and Scarritt & Champlin do not agree that Section 6 is correct, and will submit their requested findings as to the material contained in that section.

Scarritt & Champlin, Attorney for D. J. Oven, Glowrene Gentry Hoehn, J. M. Gentry. Harry O. Glasser and W. J. Otjen, Attorney for Burchard Denker and R. R. Kisner.

[File endorsement omitted.]

[fol. 123] In United States District Court

Findings of Fact and Conclusions of Law—
Filed Aug. 10, 1943; Re-filed Sept. 16, 1943

Jurisdictional Facts.

The plaintiffs here, commonly referred to as the Crews heirs,[1] as judgment creditors sue all of the above named defendants, either as stockholders, or directors, or both, or legal representatives of such, on a judgment for $249,000.00 against the American National Bank of Enid,[2] obtained in the district court of Garfield county, Oklahoma, and affirmed on appeal to the State Supreme Court.[3] Two executions against the Bank had been returned nulla bona.[4] Thereupon, defendants' liability to creditors arose, it is asserted.

The Bank, before the filing of the state suit, in December, 1931, had gone into voluntary liquidation, November 25, 1929, and through that process had paid off all creditors, except the plaintiffs, whose claim had not been listed among the liabilities. The defendants here, other than the Bank, were stockholders of the Bank, or heirs, devisees, legatees or legal representatives of stockholders; and some of them were directors[5] as well as stockholders. Some of the named defendants were non-residents;[6] some had died;[7] some were not served with process herein;[8] and some made settle-

[1] Hereinafter they will be designated as the Crews heirs.

[2] Hereinafter called the Bank.

[3] American National Bank of Enid vs. Crews, 126 P. (2d) 733.

[4] One execution was issued December 9, 1937, another in June, 1942, after affirmance by the State Supreme Court.

[5] See Note 11, and findings to which it is appended.

[6] Ed Klein; Max and Morris Hirsch; Joseph Weil; Helen Walker King, nee Walker; Louis H., Herman A., Theodore C., Lydia C., Malinda M., and Henry Walker; F. C. Klosner. See also note 11.

[7] C. Brumfield before filing date of this action; E. M. Abbott afterwards. No revivor in either case.

[8] The non-residents named in note 6.

ment.[9] As a result, there were left actively defending this action the following named defendants, who for purposes here, will be generally referred to as the defendants: D. J. [fol. 124] Oven, Glowrence Gentry Hoehn; J. M. Gentry; N. E. Crumpacker; Faith W. Crumpacker; G. E. Hudson; G. E. Munger; Florence Gannon Lovell; Ruth Munger, nee Gannon; Florence Lovell, administratrix of the estate of Katie Gannon, deceased; C. F. Randolph; R. L. Sanford; M. C. Garber; R. R. Kisner; and B. Denker.[10]

The Complaint as Affecting Jurisdictional Issues

The first and second causes of action are for a claimed liability of stockholders and are against all of the individual defendants, except that M. C. Garber is a defendant only in the second cause of action; but the third cause of action is against only the ten stockholders who were directors at the time of the liquidation of the Bank and is against them only as they served in that capacity or the resulting legal capacity thereby incurred in liquidation. Of these ten, five were non-residents,[11] and the following now defend: R. L. Sanford; N. E. Crumpacker; C. F. Randolph; D. J. Oven; and Faith W. Crumpacker. The Bank is a nominal defendant.[12]

There is no diversity of citizenship [13] and the jurisdiction

---

[9] Heirs and representatives of W. B. Johnston; Eugene and Irene Watrous; John Vater; Albert Hirsch; Max Hirsch; Morris Hirsch; George B. Roberts, individually and as trustee; Max M. Roberts; Bess R. Nelson; and Margaret Van Dyne.

[10] Garber was not a stockholder when distribution complained of in first and third causes was made. Ruth Munger and Florence Lovell, individually and as administratrix of the estate of Katie Gannon, deceased, represent Katie Gannon.

[11] Albert Hirsch, Floyd E. Felt, Bess Felt, T. E. Vessels, and Kathryn Vessels.

[12] As judgment debtor it is properly here for complete parties.

[13] Only one of the plaintiffs, Mary Willis, nee Crews, was a non-resident of Oklahoma; the Bank was established and domiciled at Enid, Oklahoma, and the defendants above named as actively defending, as well as Katie Gannon in her lifetime, were residents of this judicial district.

of this court is challenged, necessitating a more detailed statement of the issues. The challenge was made by motions to dismiss, preserved, by permission of the court, in the answer,[14] and renewed at the trial.

Some of the allegations of the complaint are by adoption made parts of all three causes.[15] These common allega- [fol. 125] tions set out the fact of plaintiffs' judgment, referring to a copy thereof at-ached; recite the voluntary liquidation of the Bank and its then insolvency; give the amount and number of the shares of stock; assert the bringing of the suit as a creditors' bill for the plaintiffs on the judgment liability and for any other creditors who may come in, but deny the existence of any other creditors; aver the bill is to enforce and have judicially administered the trust arising from insolvency and proceedings in liquidation of the Bank; ask the determination and enforcement of the liability of the stockholders of the Bank; and claim that the suit is one arising under the laws of the United States.[16]

The first cause of action, by additional allegations, seeks to establish a trust in liquidation dividends paid stockholders of record out of the proceeds of $240,000.00[17] from the sale of assets when the Bank ceased business, asks an accounting for those sums so paid, less any amounts paid back by the shareholders,[18] and prays judgment for the plaintiffs for any sums to be found due.

The second cause of action, in addition to the general allegations, gives the names of those who, at the date of the voluntary act of liquidation and within the sixty-day period prior thereto, were shareholders, and seeks to recover what is commonly referred to as the "double lia-

---

[14] The motions were overruled [by another judge] without prejudice to re-presenting the questions involved.

[15] The causes of action may not be separate in some aspects.

[16] The bill does not designate the laws, but the claim is under sections of the Banking Act and the Judicial Code. —Sections 63 and 64 of Title 12, U. S. C. A., and section 41 (16) of Title 28, U. S. C. A. The sections were considered by both sides at the trials.

[17] Par value of shares was $100.00 each, hence this paid back the original capital and 20 per cent additional.

[18] Amounts are hereafter shown in the findings.

bility" of the shareholders, alleging that a full assessment against the shareholders will be necessary to meet plaintiffs' claims.

The third cause of action alleges that upon voluntary liquidation of the Bank the directors became trustees, charged with the duty of collecting all assets, paying creditors, and winding up the affairs of the Bank; that they wrongfully distributed the $240,000.00 and #38,500.00[19] ad-
[fol. 126] ditional realized from assets, as a liquidating dividend and should account therefor to the creditors, and asks judgment therefor.

Tax on the judgment was paid, in accordance with the State's intangible tax law.[20]

The Bank appointed its president, T. E. Vessels, as liquidating agent. He performed, with the directors, certain acts of liquidation, including the collection of certain assets and the application thereof on liabilities, but never at any time attempted to collect upon the liabilities claimed in the three causes of action herein, unless the action to require the stockholders to refund dividends distributed to the extent of ten per cent of the value of the stock may be such attempt. He became a non-resident of the state. No proceedings, other than this action, have ever been taken in court or through the Comptroller of the Currency to wind up the affairs of the Bank, or to collect the obligations claimed here. The Comptroller of the Currency has never attempted to exercise jurisdiction over the liquidation in any manner to exclude the Bank Officers or proper court action. Defendants admit there are no other creditors and no other assets.[21]

No proceedings, other than this action, have ever been taken in court or through the Comptroller of the Currency

---

[19] $23,500 allegedly collected on notes and obligations not transferred to purchasing bank, and $15,000.00 allegedly returned or refunded by shareholders and paid to creditors other than the plaintiffs. (Amounts do not conform to proof, however.)

[20] Amendment allowed to conform to admitted facts. Possibly a jurisdictional allegation in an action in state court. O. S. 1941, Title 68, section 1515.

[21] These facts involve jurisdictional groundwork. See following notes 22, 23, and 24.

to wind up the affairs of the Bank, or to collect the obligations claimed here.[22] The Comptroller of the Currency has never attempted to exercise jurisdiction over the liquidation in any manner to exclude the Bank officers or proper court action.[23] Defendant admits there are no other creditors and no other assets.[24]

[fol. 127] The Crews heirs in the State court litigation claimed that the Bank aided, assisted and participated with the Farmers State Bank of Garber in the embezzlement, misappropriation, conversion and dissipation of bonds to the value of $249,000.00, with interest thereon. The bonds had been purchased from funds accruing from seven-eighths of certain oil runs, in escrow under agreement between the Crews heirs and the Garber Refinery, pending conclusion of litigation involving an oil lease. The agreement permitted the purchase of United States bonds, to be held in lieu of money.[25] Hundreds of thousands of dollars worth of these bonds were purchased from time to time during a period beginning June 13, 1922,[26] and some of such bonds admittedly were received by the Bank for safekeeping,

---

[22] See Title 12, sec. 193, U. S. C. A. Procedure provided by statute where Comptroller takes charge as exclusive. Fash v. First National Bank, 89 F. (2d) 110, (10th C. C. A.).

[23] Comptroller in voluntary liquidation may act to appoint receiver. Waldrop v. Martin, 188 So. 59 (Ala.); O'Connor v. Watson, 81 F. (2d) 833, (5th C. C. A.), Cert. den. 56 S. Ct. 678.

[24] The claims in causes one and three are assets. The assets of an insolvent corporation which constitute a trust fund for creditors "may consist of—choses in action, claims of various kinds—and rights against stockholders for dividends paid out of capital." Gannice v. Schoder, 261 Pac. 393, (Wash.). Also the stockholders' liability is an asset for creditors. Robbins v. Mitchell, 108 F. (2d) 56. (9th C. C. A.). The stockholders' liability to repay dividends is an asset. Hayden v. Thompson, 71 Fed. 60, (8th C. C. A.).

[25] The term "bonds" herein includes other obligations of the United States, such as treasury certificates and interest coupons.

[26] $534,000.00 worth. Amer. Nat'l Bank v. Crews, 126 P. (2d) 733, 735.

others were received by it from other banks for and on behalf of the Garber bank.[27] The Bank asserted that its handling of the bonds was in regular and ordinary business and that it merely followed directions of the Garber bank without notice or knowledge of any wrongful use of the bonds, and acted in good faith.

The state trial court instructed the jury that the deposit of bonds with the Bank constituted the Bank a gratuitous bailee of the Garber bank, and that it would be liable to plaintiffs only on one of three theories: (1) If the Bank, through its officers appropriated such bonds to its own use and benefit and failed to make restitution in kind on demand; (2d) if the Bank, through its officers, knew that the Garber bank or its officers were appropriating the bonds to their own use, and if, without inquiry into their right, power and authority so to appropriate, it knowingly aided, abetted and assisted the Garber bank or its officers therein, though without profit to the Bank; or (3) if the Bank, with [fol. 128] knowledge of the wrongful intent of the Garber bank and its officers to misappropriate, aided and assisted the Garber bank therein to obtain possession of bonds deposited for safe keeping in other banks and to misappropriate them.[28]

The court instructed further that in case (1) the Bank would be liable for the reasonable value of the bonds appropriated, in case (2) would be liable for the loss proximately resulting, and in case (3) for the loss sustained; but further instructed that the amount of recovery would be the par value of the bonds converted with interest from date of conversion.[29]

---

[27] $269,000.00 passed through or were handled by the Bank. Id.

[28] These instructions are discussed in the State courts opinion at p. 744, of 126 P. (2d).

[29] There was no claim for special damages, or for exemplary damages. The measure given is essentially the same as would be on assumpsit for implied contract.

The Supreme Court designated it as an action in conversion, 126 P. (2d) p. 744. The entire opinion of the Supreme Court is in evidence, and contains a rather full statement of the issues involved, scope of the evidence, and nature of the instructions given.

Conclusions of Law

The court concludes—

It has jurisdiction of the entire controversy as a part of the "winding up" process of the Bank. The fact that the Bank went into voluntary liquidation, but stopped short of "winding up"* the affairs, gave the federal court

---

* A liquidating committee is a recognized agency for winding up the affairs of a Bank, but does not have to be recognized by the court. Holland Banking Co. v. Continental National Bank, 43 F. (2d) 640, (D. C.). Directors supervise liquidation, (sec. 181, Title 12, U. S. C. A.), but they can hardly be depended upon to collect assets in the nature of liabilities against themselves. They are, however, trustees for creditors of the trust funds, which the assets constitute. Butler v. Cockrill, 73 Fed. 945, (8th C. C. A.). See In re American Bank and Trust Co. of Ardmore, 176 Okl. 202, 55 P. (2d) 470. The process of *liquidating* the assets of a corporation for purposes of distribution is a winding up. Bouviers' Law Dict., 3d Rev., "Winding Up." "The very meaning of the word 'liquidation' implies the winding up of the affairs of the corporation." Assets Realization Company v. Howard, 127 N. Y. S. 798, 816. The underlying purpose of the complaint here is to enforce and administer the trust in the three classes of assets and to use them to pay off all remaining creditors, thereby effectually completing the "winding up" of the Bank's affairs. "A suit to enforce and judicially administer the trust arising from the insolvency and proceedings in liquidation, is a suit arising under the laws of the United States. It is also a suit to wind up the affairs of such banks." George v. Wallace, 135 Fed. 286, (8th C. C. A.). Aff. Wyman v. Wallace, 201 U. S. 230. Jurisdiction to appoint a receiver to collect the assets, and jurisdiction of suits by a receiver to collect assets could hardly be questioned, as suits to "wind up" affairs of bank. Bates v. Dresser, 229 Fed. 772, (D. C. Mass.). "Section 41, sub-sec. 16, 28 U. S. C. A. confers jurisdiction upon the district courts of the United States 'of all cases commenced, * * * and cases for winding up the affairs of any such bank." The phrase " 'and cases for winding up the affairs of any such bank' is in the conjunctive and is a distinct grant of jurisdiction." Lawrence National Bank v. Rice, 83 F. (2d) 642, (10th C. C. A.). By going

[fol. 129] jurisdiction to complete the process at the suit of creditors, under section 41(16) of Title 28, U. S. C. A.[b]

2) It has jurisdiction of the second cause of action as a creditors' bill under sec. 65, Title 12, U. S. C. A.,[c] to enforce the liability created by sec. 63[d] of said title. The

---

into voluntary liquidation the Bank began the winding up process, and this suit is to conclude that purpose, in which the directors fell short. "For the purpose of effecting an equitable and economical distribution of the assets of such bank among its creditors, all its assets by entering upon voluntary liquidation are as effectively placed in the hands of the law for the purpose of liquidation as though a receiver were appointed. The end to be accomplished is the same." Braver, Liquidation of Financial Institutions, p. 417, sec. 392. Mahoney v. Bernhardt, 62 N. E. 1087.

---

[b] Brown v. O'Keefe, 300 U. S. 598. "The two subjects of applying all the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank." Richmond v. Irons, 121 U. S. 27; Wyman v. Wallace, 201 U. S. 230.

[c] This section (c. 156 § 2, 19 Stat. 63) enacted in 1876 vests jurisdiction in the United States Court of the district where a national bank is located to enforce the liability imposed by section 63. Defendants do not question this general principle.

[d] This section and section 64 in this respect are substantially the same and provide that the shareholders of a national bank "shall be held individually responsible for all contracts, debts and engagements of such association" * * * "to the extent of the amount of their stock therein" (sec. 63) * * * "each to the amount of his stock therein" (sec. 64) * * * "at the par value thereof in addition to the amount invested in such shares." ["Stock"—sec. 64]. The liability here is not affected by sec. 64a, since the Bank was not transacting business on July 1, 1937, and shares were issued prior to June 16, 1933.

judgment sought to be enforced is included within the provisions of such sections.*

3) It has jurisdiction to determine the liability, if any arising under the first cause of action and the third, as incident to and a necessary requisite to the determination of

---

* The fact the claim of the Crews heirs was contingent does not prevent liability. "A corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim * * * or the holders of a claim in tort, 76 N. Y. 9; John V. Campagne Lumber Co., 157 Fed. 407." Pierce v. United States, 255 U. S. 398. "It is urged that the respective judgments are of no greater rank or higher dignity than the claims upon which they are founded; that they are founded on unliquidated claims sounding in tort [libel] and consequently were not debts within the meaning of the law of Missouri upon which a creditors, bill could be predicated for recovery out of distributed assets. The contention was completely answered in Pierce v. United States, *supra*, 255 U. S. 398." Gaskins v. Bonfils, 79 F. (2d) 352, (10th C. C. A.). In Continental National Bank v. Holland Banking Co., 66 F. (2d) 823, (8th C. C. A.) it appears the Holland Company as judgment creditor sued the Continental Bank, relying on a judgment obtained in the Missouri courts for *conversion* (see first sentence of opinion 324 Mo. 1, 22 S. W. (2d) 821). The state court action was brought after the Continental had gone into liquidation, and judgment, after appeal, became final more than seven years after liquidation. Suit in federal court resulted, asking "a winding up of the defendant bank, ascertainment of the debts and assets of the defendant bank, an application of the assets to the payment of debts, and judgment against stockholders of defendant bank sufficient to pay any deficiency, not exceeding the statutory liability." The trial court held it had jurisdiction. See note p. 828 of 66 F. (2d). And jurisdiction on appeal was not challenged.

The Bank's liability was based on its relationship to the Crews heirs in that, knowing that certain bonds belonged to the heirs, it "received them for safe-keeping and issued receipts therefor and, contrary to the intent and purpose of the deposit for safe-keeping, would then use the bonds for its own purposes." Opinion Oklahoma Supreme Court,

the amount of the double liability under the second cause of [fol. 130] action,[f] and since all parties to the first and third causes of action are parties to the second, there is no reason why complete relief should not be given in this court.[g]

---

p. 737 of 126 P. (2d). The safe-keeping of bonds and other negotiable securities is a part of the legitimate business of a national bank. National Bank v. Graham, 100 U. S. 699, citing R. S. sec. 5228, (12 U. S. C. A. 133). Certainly a bank receiving bonds for safe-keeping "engages" to return them or like kind, and thereby creates an "engagement." The terms "contracts, debts or engagements" may include all pecuniary liabilities and obligations of the bank. Indeed, that is a well-recognized meaning of the word 'engagement.' Plaintiffs' claim is for the money the bank fraudulently got from him and used in its business." Oppenheimer v. Harriman Bank, 301 U. S. 206, 213. No real distinction can be made between fraudulently getting money from one and *using it in its business*, as stated by the high federal court, and fraudulently getting or taking bonds of one and *using them for its own purposes*, as stated by the high Oklahoma state court. (Cf. Oppenheimer case and the Oklahoma Supreme Court case involved herein). The use of the bonds either in its business or for its own purposes unquestionably created a bank obligation or engagement. Furthermore the form of action in Oklahoma is unimportant to relief and a litigant is not required to designate the form. Doss Oil Royalty Co. v. Texas Company, vol. 14 O. B. J., p. 697 (Apr. 27, 1943). "The bank was bound in good faith and in law to return them [the bonds] or to keep them, without gross negligence until they were called for. If, when applied for, they were refused, it cannot be doubted that they, or their value, according to the form of action adopted, might have been recovered. In many cases when there is a valid contract it may be regarded only as inducement and as raising a duty, for the breach of which an action may be brought *ex contractu* or *ex delicto* at the option of the injured party." National Bank v. Graham, *supra*.

---

[f] Jurisdiction of the second cause is subject of second conclusion, *supra*.

[g] See Hall v. Ballard, *supra*, and note b *supra*. "A court of equity in a single suit will investigate and determine all

There was no misjoinder of causes. (See note g below).

[fol. 131] The Judgment—The Action Herein Not Barred by Limitation

1. The action which resulted in the judgment sued on here was commenced in the State court December 16, 1931. The conversions claimed began in 1922 and continued until some time not long prior to liquidation. The case was tried and judgment was entered on the verdict of the jury October 29, 1937. The cause was appealed and finally affirmed June 16, 1942, when petition for rehearing was denied.

2. No part of the judgment had been paid at the time of bringing suit, and the Crews heirs were, therefore, judg-

---

questions incidental to the determination of the main controversy. Greer Inv. Co. v. Booth, (10th C. C. A.) 62 F. (2d) 321. The question of inconvenience and expense, together with the presentation of a common point of litigation, whereby the rights of all parties to this suit may be settled, resolves the question of alleged misjoinder or multifariousness in favor of maintenance of the action. Id. Generally under statutes imposing the "double liability" it is necessary for a court to determine first the value of all assets and impose the liability only for the difference between that value and the value of creditors' claims. Braver, Liquidation of Financial Institutions, p. 401 *et seq.* This is equity, similar to marshaling of assets. In national bank cases the rule is the same. Thus, in Hall v. Ballard, 90 F. (2d) 939, (10th C. C. A.), based upon United States, ex rel. v. Knox, 102 U. S. 422, it is held that a federal court has jurisdiction in equity to determine the necessity and amount of liability, and that it is necessary to ascertain (1) the total par value of the stock, (2) the amount of deficit to be paid *after exhausting all the assets of the bank*, and (3) then apply the rule that each shareholder contribute his pro rata part. The Comptroller, when he takes charge, after examination, has right to make assessment to prevent delay, but it is doubtful that court can make assessment without determining at least the value of other assets. A stockholder might compel this. "The amount of each shareholder's liability could only be determined after trial." Warner v. Citizens National Bank, 267 Fed. 661. See Nagle v. O'Connor, 89

ment creditors for the full amount of the judgment with interest and costs. Since the beginning of this suit other stockholders, by way of settlement, have made payments aggregating $54,675.00, which have been applied first to payment of interest and then to principal.

[fol. 132] 3. Defendants here filed motions or applications to stay this proceeding, pending the determination of the cause in the State Supreme Court, and asked for injunction to prevent the plaintiffs from maintaining this action until the decision in the State court's action became final. The court granted their motions for stay and issued the injunction. In their various applications the defendants urged

---

F. (2d) 936. A comprehensive suit in equity is commonly the proper remedy against shareholders where insolvency becomes manifest in voluntary liquidation. Brown v. O'Keefe, 300 U. S. 598. See Hayden v. Thompson, 71 Fed. 60, (8th C. C. A.). "It therefore becomes essential in such a suit that the entire status of the affairs of the bank be investigated, and a reference had to determine what proportional part of the shareholders' liability will be necessary to be enforced against them." Williamson v. American National Bank, 115 Fed. 793, 797. Under present rules reference is an exception (R. C. P. 53 (6) and is not necessary in case like this. A receiver would be proper for enforcement of causes one and three, and would be appointed if such involved collection of assets from persons not parties to the second cause. If appointed, his suit to collect assets would unquestionably be part of "winding up" process. Receiver unnecessary for cause two. Williamson v. American Bank, 109 Fed. 36. Frank v. Geisy, 117 F. (2d) 122, (9 C. C. A.); Richmond v. Irons, 121 U. S. 27, 65; and in Gaskins v. Bonfils, (note 3, *supra*) the court apparently did not deem it necessary to appoint a receiver to force repayment of liquidating dividends. The creditors as ultimate beneficiaries of the *turst* may sue as the real parties in interest (R. C. P. 17) and joinder of various defendants *ia* authorized (R. C. P. 20). It is only a step from determining whether there is a liability under causes one and three and the amount thereof to rendering judgment. This court surely has jurisdiction to take that step to give complete relief.

that the plaintiffs could not maintain their action until the State court's judgment became final.[30]

Plaintiff Compelled to Obtain Judgment Before Filing This Action—Judgment Became Final When Affirmed on Appeal—Defendant Estopped to Assert Otherwise

C-4. Where there has been a voluntary liquidation of a national bank, and the assets of the bank have been distributed to the stockholders, and thereafter judgment is obtained against the bank in excess of the total distribution, claim against the stockholders for the amount each received and for double liability on the stock, does not accrue until the claim against the bank has been reduced to judgment.[a]

---

[30] The defendants Kisner and Denker urged in their brief on the motion that this court's use of jurisdiction "should in good conscience go no further than to permit the filing of the case, *to prevent the statute of limitations and laches from being later plead by the stockholders.*"

Those defendants further contended: "It will be noted that the situation here and the one existing in the reported case [Warner case, 267 Fed. 661] are identical except that the alias execution was issued after the affirmance of the judgment of the lower court by the Supreme Court of Oklahoma * * * *we say that such alias execution must also issue here, before this court may proceed to determine stockholders' so-called liability upon a judgment in another jurisdiction (against a separate legal entity) which in fact does not exist against such stockholders until such final judgment in the Supreme Court shall have been obtained.*" Emphasis added here. Defendants Oven, Sanford, Randolph, the Bank, Kisner, Denker, the Crumpackers, Gannon, Garber, Abbott, Hudson, the Mungers and Lovell, in motion to stay proceedings, filed Mar. 7, 1938, alleged this action was prematurely commenced and "Plaintiffs have no right to maintain this action against defendants in this cause until the final determination of said action [state case] on appeal." Defendant Hoehn asked dismissal on ground that judgment had not become final.

[a] Swan Land and Cattle Co. v. Frank, 148 U. S. 603; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371; White Co. v. Finance Corp. of America, 3 Cir., 63 F. (2d) 168; Porter, et al. v. Rott, 116 Okl. 3, 243 Pac. 160; Indian Land & Trust Co. v. Owen, 63 Okl. 127, 162 Pac. 818.

C-5. The judgment did not become final while the appeal was pending and remained undetermined by the appellate court.[b]

[fol. 133] C-6. A party, giving the reason for his position in a legal proceeding, is estopped from changing his ground; and a defendant may not assert a position inconsistent with one previously successfully maintained in the same action.[c]

Neither of the three counts in this action are barred by the applicable Oklahoma Statute of Limitation. There was no laches on the part of the plaintiffs, nor was there any hardship or loss resulting to defendants from any act, omission or delay of plaintiffs.

Facts of Liquidation and Insolvency

4. When the Bank went into voluntary liquidation, it sold all of its assets to the First National Bank of Enid for $350,000.00, payable as follows: $10,000.00 as disclaimer value to certain real estate; $240,000.00 in cash; $100,000.00 to be paid thereafter, provided certain guaranteed assets could be collected.

5. Shortly after receipt of the $240,000.00 in cash, in December, 1929, the directors of the Bank ordered distributed the entire sum as a liquidating dividend, or $120.00 per share, to the shareholders of record November 25, 1929.

6. The $240,000.00 was paid before the status of the Bank was determined and before the results of the attempts of the assignee to realize on the assigned assets had become known. The $100,000.00 specified in the contract of sale was not paid, because the amount guaranteed was not realized from the commercial paper at its maturity dates. The total additional amounts paid on the Bank's guarantee to its assignee were $30,000.00 (borrowed from the Enid

---

[b] Coppedge v. Clinton, 10 Cir., 72 F. (2d) 531; Black on Judgments, vol. 2 § 510.

[c] Ohio & M. R. Co. v. McCarthy, 96 U. S. 258; Davis v. Wakelee, 156 U. S. 680, 690; Sebastian Bridge Dist. v. Hedrick, 4 F. (2d) 346; Chandler v. McKerral, 7 Cir., 68 F. (2d) 343; Axelrod v. Osage Oil & Ref. Co., 8 Cir., 29 F. (2d) 712, 729; Penny Stores v. Mitchell, 59 F. (2d) 789; Galt v. Phoenix Indemnity Co., D. C. Cir., 120 F. (2d) 723.

Bank and Trust Company) and $8,591.48 paid by five shareholders.[31] These payments settled the obligations to the First National Bank.

[fol. 134] 7. Some of the disclaimed real estate was disposed of and the proceeds used to pay the mortgage thereon, to take up notes from the First National Bank, and to liquidate obligations of the American National Mortgage Company for the benefit of the Bank's stockholders.

The $30,000.00 loan from the Enid Bank and Trust Company was used to take up all notes held by the First National Bank and not taken over under the purchase contract. Pledge of assets of the Bank to secure this loan was authorized. By November 14, 1930, there was still due on this obligation $28,000.00. The directors then declared it impossible to realize this amount from the assets, and levied an assessment of ten per cent on the par value of the stock to be used, with other assets, to liquidate this indebtedness. The ten per cent assessment was collected to release all assets of the Bank held by the First National, in an attempt to allow the liquidator to realize more on the assets.

9. No evidence was offered to show that any valuable assets remained in the Bank after liquidating the loan of $30,000.00; and the facts of forced payments by the stockholders to the First National and of the assessment upon the stockholders, corroborate, rather than refute the presumption of lack of assets arising from the return of the executions "no property found."[32]

10. Until November 25, 1929, the Bank was a going concern and was believed by all the defendants here defending to be a solvent as well as a going concern.

11. For some time prior to November 14, 1929, and on said date, and at all times thereafter, the Bank was insolvent in that its liabilities, including the claim of the Crews heirs, were in excess of the value of its assets; but, not tak-

---

[31] The agreement provided that in case the $100,000.00 should not prove sufficient, "the stockholders of first party [the Bank] acknowledge and confess their liability under section 2 of section 5220 of the National Banking Act." See Finding 43 hereafter.

ing into consideration that claim, (or, excluding it from computation of the liabilities,) the Bank was solvent until November 26, 1929.

12. There were no other creditors of the Bank.

[fol. 135] **Bank Failed to Meet Its Obligations. For Assessment of Double Liability Non-Resident Stockholders Not Necessary Parties**

C-7. The Bank failed to meet its obligations on November 26, 1929, the day after it ceased to do business, and hence all who were stockholders on said date were liable for assessment under the provisions of sec. 64, Title 12, U. S. C. A.[a]

---

[a] An execution unsatisfied is evidence of insolvency. Terry v. Tubman, 92 U. S. 156; American Bank v. Port Orford Cedar Co. (Ore.), 12 P. (2d) 1014.

[a] Theoretical state of balance sheet does not determine the status of a bank. Evidence may show actual insolvency. Smith v. Witherow, 3 Cir., 102 F. (2d) 638. In determining the question of insolvency, a liability actually existing, though unknown at the time, must be considered. Scott v. Commissioner of Int. Rev., 8 Cir., 117 F. (2d) 36, 38. If a liability exists at the time of voluntary liquidation, whether so considered as such or not, it is still an obligation of the bank, though suit is not brought until after liquidation. Cf. Frank v. Giesy, 9 Cir., 117 F. (2d) 122. The day after the date of voluntary liquidation by a transfer to another bank, which assumed all liabilities except as to shareholders, was considered the date of the failure of the Bank to meet its obligations in Collins v. Caldwell, 5 Cir., 29 F. (2d) 329.

Since there is no evidence of substantial losses in the value of the assets after the date given here, and it appears that the amounts realized on the assets have been insufficient to pay obligations, it is proper to conclude that the Bank was insolvent since November 29, 1929. See Fowler v. Crouse, 2 Cir., 175 Fed. 646. The liability evidenced by the judgment actually existed long before that date, and therefore enters into the balance sheet.

The vote of shareholders December 20, 1929, apparently was made formally to ratify previous action of November 29, 1929, when transfer to First National Bank was made. But if the date vote was made would control, the effect is the same.

C-8. In case of voluntary liquidation, when it appears necessary to charge the stockholders under the "double liability" statute, it is unnecessary to make the non-resident shareholders parties[b] and it is unnecessary to have the Comptroller make an assessment, based on the judgment of the state court, and a determination of the necessity to resort to such liability.[c]

Distribution to Stockholders

13. At the time of the disbursements of the $240,000.00 liquidating dividend the following of the defendants here [fol. 136] now involved owned stock in the following amounts and received their part of said sum on the basis of the said $120.00 per share:

Owner of Shares	Number of Shares
N. E. Crumpacker	200
Joseph Weil	15
E. M. Abbott	10
R. L. Sanford	15
C. Brumfield	10
Floyd E. Felt	30
R. R. Kisner	10
Burchard Denker	20
T. E. Vessels	129
Charles K. Walker	20
R. D. Anderson	10
G. E. Hudson	10
Max Hirsch	98
Albert Hirsch	98
Morris Hirsch	96
Ed Klein	100
G. E. Munger	16

[b] Sec. 181, Title 12, U. S. C.; Sec. 63, 65, Title 12, U. S. C.; Hale v. Harden, 95 Fed. 747 and cases cited therein; Taylor v. Fountaine, (Mo.) 10 S. W. (2d) 68; Hall v. Ballard, 4 Cir., 90 F. (2d) 939. Braver, Liquidation of Financial Institutions, p. 417, sec. 392.

[c] See Cases under preceding note. The demand made by the unsatisfied execution on the state court's judgment, takes the place of an assessment by the Comptroller. Warner v. Citizens National Bank, 8 Cir., 267 Fed. 661.

Owner of Shares	Number of Shares
Florence Gannon Lovell	21
F. C. Kessner	10
Clara M. Oven	45
John J. Vater	5
C. E. Gannon	130
George B. Roberts, Trustee	18
Eugene Watrous and Irene Watrous	90
D. J. Oven	570
Kathryn Vessels	30
Bess C. Felt	10
Faith W. Crumpacker	25
J. M. Gentry	27½
Glowrene C. Hoehn	27½
C. F. Randolph	80
Mrs. W. B. Johnston	26

[fol. 137] Fund Distributed a Trust Fund for Creditors

C-9. The sum of $240,000.00 realized from the sale of the Bank's properties constituted a trust fund, pledged to the payment of its debts equally and ratably, and, because of the insolvent condition of the Bank could not lawfully be diverted from the payment of its creditors and distributed to its shareholders.[a]

M. C. Garber's Stock Transactions

14. The defendant, M. C. Garber, at the solicitation of D. J. Oven (a defendant here), on November 14, 1929, sold the said D. J. Oven his entire holding of 125 shares of stock in the Bank, together with other stocks. The sale was consummated after several days consideration, the stock certificates regularly endorsed, delivered and surrendered for transfer, and a new certificate for the full amount thereof was issued and delivered to said D. J. Oven. The total consideration for the entire transaction was $25,625.00, which was paid in due course, and admittedly included a valuable consideration for the bank stock.

---

[a] Fraud is immaterial. John v. Champagne Lbr. Co., 157 Fed. 407, aff. 168 Fed. 510; Butler v. Cockrill, 8 Cir., 73 Fed. 945; Pierce v. U. S., 255 U. S. 398; Hunn v. U. S., 8 Cir., 60 F. (2d) 430.

15. The sale was made by Judge Garber, without any information on his part of any impending failure of the Bank, or that it contemplated going out of business or selling its assets, and without any knowledge that the Crews heirs had a claim against the bank, and in the belief that the Bank was solvent.[33] His claim of good faith is not disputed.

Stockholders Transferring Stock Within Sixty-Day Period Liable.

C-10. Those who were stockholders and transferred their stock at any time within the sixty-day period prior to [fol. 138] November 26, 1929, are liable secondarily, regardless of whether the transfer was or was not made in good faith.

Stock Transfer to Vessels

16. The following named defendants sold, transferred and delivered their stock in the American National Bank to T. E. Vessels for a valuable consideration on the following dates, to-wit:

C. E. Gannon	January 20, 1930
Florence Gannon Lovell	January 20, 1930
G. E. Munger	January 20, 1930
R. L. Sanford	January 19, 1931
G. E. Hudson	About November, 1930
N. E. Crumpacker	December 14, 1930
Faith W. Crumpacker	December 14, 1930
C. F. Randolph	About January, 1931
Glowrene Gentry Hoehn	, 1930
J. M. Gentry	, 1930
D. J. Oven and Clara M. Oven	December, 1930

17. At the times set out in Finding 16, all of said defendants properly endorsed their certificates of stock with proper power of attorney for transfer, and delivered them

---

[33] A stockholder ordinarily may sell his stock, if in good faith and without knowledge of impending failure, and not be liable. The transactions of Mr. Garber apparently were initiated by Oven. "In a transfer of stock made to avoid the statutory liability, we should naturally expect to find the person attempting the fraudulent scheme the actor in bringing it about." Fowler v. Crowe, 175 Fed. 646, 649.

to the said T. E. Vessels as president and liquidating agent of the Bank to be by him transferred upon the books and records of the Bank.

18. There is no evidence in the minutes, or otherwise, that the board of directors caused notice of liquidation to be [fol. 139] published as provided in sec. 182, Title 12, U. S. C., (R. S. 5221). The length of time from the date of vote for voluntary liquidation until the distribution of the $240,000.00 as dividends was obviously much less than the two months provided by said section.

19. At all times herein pertinent, before and after voluntary liquidation, T. E. Vessels has been, and still is president of the Bank.

PARAGRAPH C-10

[a] See C-7, note "a" thereof. Section 64, *supra*, further provides—"The stockholders * * * who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations * * * shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability." The sixty-day period dates from the day the bank fails to meet its obligations, not as of the date the insolvency is ascertained or determined. The dates are not identical. "If it turns out that it is insolvent, the controlling date as to liability relates back to the time the bank failed to meet its obligations, in order to determine who are the persons against whom the statutory additional liability is enforced." State of Ohio v. Union Trust, (Penn.), 8 Atl. 476. Section 64 is section 23 of the Federal Reserve Act of 1913 and superseded as to the sixty-day provision the requirement of knowledge of impending failure. "The legislative history of the act shows clearly that it was the intent of Congress to fix arbitrarily the time before the failure of a national banking association in which no transfer of its stock could be made which would relieve the transferrer from double liability." Fletcher v. Porter, 20 F. (2d) 23.

Transferrers of Stock After Bank Failed to Meet Its Obligations Liable—Stockholders Registered as Owners Liable.

C-11. No transfer of stock made after voluntary liquidation, regardless of good faith, operated to relieve the transferrer of his liability which became fixed as of November 26, 1929.[a]

C-12. The liability under sec. 64 extends to those who were registered as stockholders on said date as well as those who were the actual owners of the stock, though not registered.[b]

Defendant Oven—Additional Findings

20. On November 26, 1929, 570 shares of stock were registered on the Bank's books in the name of the defendant D. J. Oven. Of these, 65 belonged to Clara M. Oven, 105 to T. E. Vessels, 51 to N. E. Crumpacker, and 349 to D. J. Oven. Transfers to the other owners were made by D. J. Oven on December 4, 1929.

21. D. J. Oven received $68,400.00 of the liquidating dividend December 2, 1929, which he distributed as follows: To Clara M. Oven $7,800.00; to T. E. Vessels $12,600.00; to N. E. Crumpacker $6,120.00; and to himself, $41,880.00.

22. Of the 51 shares held for N. E. Crumpacker, 21 had been bought from W. B. Johnston October 5, 1929, and 30 from M. C. Garber, November 14, 1929. The 65 shares be- [fol. 140] longing to Clara M. Oven were a part of the purchase from M. C. Garber.

23. D. J. Oven, for himself, and as authorized agent for Clara M. Oven, transferred his and her entire holdings of stock to T. E. Vessels December 12, 1930, for which he received notes of Vessels for himself and his mother.[33] The

---

[a] See two prior notes. Obviously no stock transferred after the beginning of the sixty-day period could avoid liability fixed at that date.

[b] Forrest v. Jack, 294 U. S. 158, 96 A. L. R. and cases therein cited on each situation.

[33] See Findings 16 to 19, inclusive.

note to D. J. Oven was for $10,707.40, including consideration for other stock, and the note to Mrs. Oven was for her 110 shares.

24. Clara M. Oven died March 9, 1937. Her estate was duly probated and distribution thereof made to D. J. Oven, her son, as sole heir. Her estate was closed December 15, 1937, about six weeks after the judgment was secured against the Bank but before it became final on appeal. D. J. Oven received in excess of $18,000.00 from his mother's estate, as well as the note to her from Vessels.

25. The notes from Vessels have been kept alive by renewal notes. Suit thereon probably would yield nothing.

26. No claim was filed by the Crews heirs in the estate of Clara M. Oven; and none of the money received by her from the liquidating dividend was used to acquire any of the property listed in her estate.

27. The settlement for $4,000.00 of the liability claimed against W. B. Johnston's estate disposed of plaintiffs' claim on the secondary liability for 64 shares owned by D. J. Oven, purchased from W. B. Johnston, October 19, 1929.

28. At the time of the transfer of the shares to T. E. Vessels, D. J. Oven believed that the remaining assets of the Bank had some value. His first knowledge of the Crews' claim came with the filing of the suit in the State court.

29. D. J. Oven paid the ten per cent assessment on the stock for himself and mother.[34]

The figures given in his deposition do not correspond exactly to the figures stipulated. Finding 44 shows he paid $1,718.26 on his guarantee and Finding 45 shows he paid on the restoration of dividends $7,415.26 for himself and his mother paid $990.62. His testimony showed he paid back $3,490.00 for himself and $1,100.00 for his mother. The findings follow the stipulation which will control here.

---

[34] Other facts particularly applicable to the claim against D. J. Oven appear in Findings 13, 16, 44 and 45. He had no knowledge of the Crews' heirs' claim and believed the Bank to be a solvent and going concern. (Finding 10). All general findings relate to him also.

[fol. 141] Liability on First and Second Causes—Not Joint; Summary of Secondary Liability.

C-13. The liability of the shareholders on the first and second causes of action is several and not joint.[a]

In view of the foregoing principles, the status of stockholders whose "double liability" comes under consideration here is as follows:

(1) M. C. Garber, having transferred his stock within the sixty-day period was secondarily liable to his transferee, D. J. Oven.[35]

(2) W. B. Johnston was secondarily liable on the stock transferred to D. J. Oven for the same reason.[36]

(3) N. E. Crumpacker, Clara Oven and T. E. Vessels were liable for the stock bought for them by D. J. Oven although not transferred by him on the books of the Bank.[37]

(4) D. J. Oven was liable for all the shares which stood in his name on the Bank's books November 26, 1929, regardless of their actual ownership.[37]

(5) All stockholders in whose names stock was registered on the Bank's books November 26, 1929, were liable to the amount of their respective shares.[38]

(6) None of the shareholders relieved themselves of liability by transfer of stock to T. E. Vessels or any other parties after November 26, 1929.

[Clerk's note: Reference to Note 39 missing.]

(7) All stockholders to whom dividends were paid are [fol. 142] liable for the amount of dividends received by them, less any refunds they have made thereon.

---

[a] 12 U. S. C. A. 64. Robins v. Mitchell, 9 Cir., 107 F. (2d) 56; Kennedy v. Gibson, 8 Wall. 498. Obviously a stockholder can be liable to return only those dividends he has received.

[35] M. C. Garber's sale was November 14, 1929.

[36] W. B. Johnston's sale was October 5, 1929.

[37] See Finding 20.

[38] Forrest v. Jack, *supra*.

[39] The court is not called upon to determine what rights, if any, they have against Vessels.

Gannon Stock—C. E. Gannon and Katie Gannon, Their Heirs and Representatives.

30. C. E. Gannon held 130 shares of the Bank's stock on November 26, 1929, and on the date of the distribution of the liquidating dividend.

31. Mr. Gannon died December 4, 1934, and his will was regularly admitted to probate. The devisees under the will were his wife, Katie Gannon, and his two daughters, Florence Lovell and Ruth Munger. These three were also residuary legatees. No distribution was made to other legatees, who were paid by the three named. The will recited that it should cover all real estate not having been formerly deeded, and that all property in his wife's name belonged to her as her individual property.

32. Gannon in December, 1926, conveyed real estate of substantial value to his wife and daughters. Other conveyances of real property were made to the same parties in 1932 and subsequent years. Within two years before his death, he transferred by proper conveyances real and personal property, to his wife and daughters of a value in excess of $50,000.00. The deeds to the real estate were not recorded until after his death and he paid the taxes on a substantial portion of the real estate until his death. Katie Gannon, the widow, Florence Lovell and Ruth Munger, daughters of Gannon, received by gift and inheritance, and otherwise, nearly all of Gannon's estate of the value of $300,000.00, and the value of the property that each inherited was in excess of $16,500.00.

33. G. E. Munger and two others named as executors duly qualified and gave notice to creditors to present claims on or before June 18, 1935. The Crews heirs did not file a claim against the estate and on February 29, 1936, a final decree of distribution was entered without mention of any claim; the estate was distributed to the wife and two daughters prior to the securing of the judgment against the Bank on October 29, 1937.

34 The only real estate shown on the appraisement was [fol. 143] listed as a small fractional oil and gas right, appraised for $5.00 and personal property in cash and notes was appraised at a little more than $1,700.00. The appraisers, however, charged for appraising "property trans-

ferred by C. E. Gannon in *contemplated* of death for inheritance tax purposes."

35. The executors reported to the proper federal and state authorities for inheritance and gift tax purposes. The probate court found that all inheritance and gift taxes had been paid. The government made a re-computation, remitting part of the inheritance tax, and increasing the gift tax on the theory of gifts made during the year 1934 in excess of $100,000.00 each to Katie Gannon, Ruth Munger and Florence Lovell. Gift taxes for preceding years were paid. Gifts of real estate and other property by C. E. Gannon to his wife and children during the preceding years of his life were made in good faith.

36. Katie Gannon, the widow of C. E. Gannon, died on May 24, 1941, leaving as heirs to her estate, of about $90,000.00, her daughters Florence Lovell and Ruth Munger. In the administration of her estate, notice to creditors was given and the estate was duly distributed on November 21, 1942. Prior to the entry of the order of final distribution in the Katie Gannon estate, the plaintiffs' claim had accrued and became absolute and the plaintiffs had not filed such claim in the estate of Katie Gannon.

37. Katie Gannon, Florence Lovell and Ruth Munger, defendants in this case, applied for and secured a stay against any further proceedings for the collection of the respective claims against them by reason of the judgment obtained against the Bank, as shown in Finding 3. The judgment became final on appeal when rehearing was denied June 16, 1942, and it was not until then that the plaintiffs in this action could have proceeded in any manner to enforce the liability of these defendants in this court or in the county court of Garfield County, the court in which the estates of C. E. Gannon and Katie Gannon were administered.

[fol. 144] Claimants May Proceed Directly Against Heirs and Devisees of Deceased Stockholder Where Decedent's Estate Has Been Fully Administered Before Accrual of Claim.

C-14. A claim may be enforced by direct action against the heirs, devisees or legatees of an estate who have received any part thereof to the extent of the value received

where the estate of the decedent has been administered and distributed before such claim against the estate of decedent has accrued or become enforceable.[a] To bind either the heirs, devisees, or legatees, the ancestor's estate must have been settled and closed before the claim accrued or became enforceable.[b]

Facts Claimed to Show "Unclean Hands."

38. During all of the time involved in the state court case of the Crews heirs against the Bank, the stock in the Garber Refining Company was owned by substantially *diferent* persons from those who owned stock in the Farmers' State Bank of Garber, involved in the transactions at issue in that suit, and the Crews heirs owned no stock in the Farmers' State Bank during that period.

39. During the trial of the case in the state court, Ralph Crews, one of the plain-iffs here, and then trustee for other heirs, testified that the Crews heirs loaned the Garber Refinery in 1923, $15,000.00 by use of a $10,000.00 bond purchased with money out of the Crews estate escrow account in the Farmers' State bank of Garber and by cash from that

---

[a] See C-4, C-5 and C-6 as to accrual of claim. Title 58 O. S. A. 598; Chitty v. Gillette, 46 Okl. 724, 148 Pac. 1048 (Wherein the Minnesota rule is approved); Matteson v. Dent, 176 U. S. 521; the Minnesota rule stated). Seabury v. Green, 294 U. S. 165; Harmon v. Nofire, 131 Okl. 1, 267 Pac. 650; O'Neill v. Lauderdale, 80 Okl. 170, 195 Pac. 121, 124; Luce v. Thompson, 8 Cir., 36 F. (2d) 183, 185; Muckenfuss v. Marchant, 4 Cir., 105 F. (2d) 469; Madison v. Buhl, (Idaho), 8 P. (2d) 271; Leavenworth Savings & Trust Co. v. Newman, 8 Cir., 23 F. (2d) 835; the Oklahoma rule permits the filing of such a claim and therefore Forrest v. Jack, 294 U. S. 158, does not apply.

[b] Title 58 O. S. A. 333. See preceding note. McCoy v. Spears, 99 P. (2d) 153; Luce v. Thompson, *supra*, 26 C. J. S., sec. 132, p. 1216. There may be no recovery against the Katie Gannon estate as plaintiffs claim under any theory had accrued prior to distribution of the estate. Recovery not to exceed $16,500.00 as to each is allowed against Florence Lovell and Ruth Munger. There may be a recovery against D. J. Oven for the amount he received from the estate of his mother, Clara M. Oven, of $18,000.00.

account, all before the litigation involving that account had been settled. From the same account a loan of $7,000.00 [fol. 145] was made to Rochester, Incorporated, in 1928 and about the same time a loan to one Butler for $3,000.00, one to H. D. Hellums for $3,650.00 and one to E. W. Lorton for $21,000.00. These loans obviously total $49,650.00. His testimony is hereby found to state the facts in reference to those thansactions.

Conclusions as to "Unclean Hands."

C-15. Assuming that there was misconduct of the Crews heirs in directing, authorizing or permitting loans from the trust fund to others, such conduct did not authorize or condone the misconduct of the Bank upon which the judgment was based, nor prevent their recovery. The doctrine of "clean hands" has no application here.[a]

Conduct of Directors.

40. At the time of the disbursement of said $240,000.00, the defendants, R. L. Sanford, N. E. Crumpacker, C. F. Randolph, D. J. Oven and Faith W. Crumpacker, directors, had no notice or knowledge of the claim of the Crews heirs. Of the directors, Faith W. Crumpacker qualified as director November 25, 1929, but never actively functioned as a director, and D. J. Oven attempted to withdraw from the directorate in December, 1930, and there is no evidence that he functioned as director thereafter.

41. Of the defending directors here, N. E. Crumpacker, R. L. Sanford, C. F. Randolph and D. J. Oven continued to function, with the liquidating agent, after November 25, 1929, in winding up the affairs of the Bank.[40]

42. N. E. Crumpacker, and C. F. Randolph, together with Joseph Meibergen, administrator with the will annexed of the estate of W. B. Johnston, deceased, were defendants in the action in the state court, but a demurrer

---

[a] See Ohio Oil Co. v. Sharp, 10 Cir., 135 F. (2d) 303, discussion and citations. Keystone Co. v. Excavator Co., 290 U. S. 240; Canfield v. Jack, 78 Okl. 127, 188 Pac. 1040.

[40] They attended the directors' meetings of December 20, 1929, May 5, 1930, July 28, 1930, and November 14, 1930.

[fol. 146] was sustained to the testimony as to them, and the cause dismissed as to them by the court.[41]

43. The facts as to the state court proceedings are as stated in jurisdictional findings, supra, and in the decision of the Supreme Court.[42] Finding 18 should again be considered here.

Directors Trustees and May Not Distribute Assets to Stockholders When Creditors Unpaid

C-16. Upon liquidation the directors became trustees for creditors and could not lawfully pay dividends to stockholders from the assets while the Bank was insolvent. Payments so made were at their peril.[a] The liability is primary.[b]

---

[41] The court evidently held that there was no evidence to support the allegations that these directors knowingly participated in or had knowledge of the conversions of the Bank. This action of the court, of course, made the judgment a final one in their favor on the issues presented in that case. The issues herein are not the same and that judgment is not *res adjudicata*.

[42] Dates of bringing that action, of decision on appeal, and of issuance of executions, as well as the dates of alleged defalcations which formed the basis of the state court's action, are urged in connection with pleas of limitation and laches.

Paragraph C-16

[a] Sec. 181, Title 21, U. S. C., charged the directors on liquidation with supervision of the liquidation which must be in accordance with law. The directors became trustees for creditors. U. S. v. Jewett, 100 Fed. 832. See McNeade v. Lalance & Co., 6 Cir., 276 Fed. 491. Distribution to stockholders cannot take place according to intent of law until all liabilities to creditors have been met. In order to close its affairs completely and effectively, bank is required to give the notice to creditors required by statute. National Bank v. Insurance Co., 104 U. S. 54. Appointment of a liquidator does not change status of directors who continue their responsibility. Braver, *supra*, p. 1321, sec. 1159. The diversion of assets is a fraud or breach of trust by directors. Hayden v. Thompson, 8 Cir., 71 Fed. 60; Sidell v. Mo. Pac. Ry. Co., 78 Fed. 725, 726; Hutchison, et al., v. Bidwell, et al., 24 Or. 219, 225; 33 Pac. 560.

[b] Corsicana National Bank v. Johnson, 251 U. S. 68, 86.

C-17. The defending directors are severally liable and the release of one does not release the other, but credit must be given for the amount received upon the claim.[a]

[fol. 147] Credits and Settlements.

44. The defendants Oven, Randolph, Sanford and N. E. Crumpacker, together with Albert Hirsch, contributing equally, paid $8,591.48 on the guarantee to the First National Bank.

45. The following persons paid back and restored to the Bank the amounts as follows:

C. E. Gannon	697.00
R. R. Kisner	53.61
G. E. Munger	85.78
G. B. Roberts, Trustee	96.50
C. Brumfield	53.61
Florence Lovell	112.70
D. J. Oven	7,415.26

Paragraph C-17

[a] Hirsch, one of the directors, settled all claims against himself, including his liability as director. Sec. 93 U. S. C., Title 12, imposes personal liability upon each director who participates in or assents to any violation of the national banking act. The provisions of the act defining the duties of directors does not relieve them of their common law duty to be honest and diligent. Hughes v. Reed, 10 Cir., 46 F. (2d) 435. Whether for liability under the national banking act or for breach of common law duty, the directors are severally liable for failure to perform their duty and suit may be brought against one or more of the directors. Gamble v. Brown, 4 Cir., 29 F. (2d) 366; Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 133; Corsicana National Bank v. Johnson, 251 U. S. 68, 84; Chesbrough v. Woodworth, 244 U. S. 72, 77. The liability being several the release of one director does not discharge the others but credit of the amount paid must be given to other directors upon the same liability. Gamble v. Brown, *supra;* City of Wetumka v. Cromwell-Franklin Oil Co., 171 Okl. 565, 43 P. (2d) 434; Safety Cab Co. v. Fair, 181 Okl. 264, 74 P. (2d) 607; Adams v. Stanolind Oil & Gas Co., 187 Okl. 478, 103 P. (2d) 526.

R. L. Sanford	223.72
C. F. Randolph	1,193.18
Eugene Watrous	442.33
Clara M. Oven	990.62
John Vater	24.57
Glowrene Gentry Hoehn	410.15
J. M. Gentry	410.15
Albert Hirsch	481.65
N. E. Crumpacker	3,233.61
R. D. Anderson	49.14
Burchard Denker	98.29
Olive Johnston	127.78
E. M. Abbott	49.14
Faith W. Crumpacker	372.87
	16,621.66

46. Since this action was commenced plaintiffs have made [fol. 148] settlements with the following defendants and on the dates and in the amounts as follows:[43]

Date	Name	No. of Shares	Amount
2- 7-38	Eugene and Irene Watrous	90	$11,250.00
2- 7-38	John Vater	5	625.00
2- 7-38	Mrs. W. B. Johnston	26	3,250.00
2-21-38	W. B. Johnston Estate, secondarily liability	64	4,000.00
9-26-39	Roberts Estate which includes George B. Roberts, Trustee, George B. Robberts, Max M. Roberts, Bess R. Nelson and Margaret Van Dyne	18	1,800.00
3-22-40	Albert Hirsch, Max Hirsch and Morris Hirsch	292	33,750.00
		490	54,675.00[44]

[43] All of which were approved by the court herein, and are of record and on file in this action.

[44] See Finding 2.

Credit on Judgment from Settlement of Claims with Certain Stockholders

47. By reason of the settlement with certain stockholders for distribution payments there must be credited upon the judgment $120.00 per share for the following shares: Eugene and Irene Watrous, 90; John Vater, 5; Mrs. W. B. Johnston, 26; Roberts Estate, 18; and the Hirsches, 292, a total of $51,720.00. This is credited as of the date of the judgment as interest was also released in the settlement leaving a balance due on the judgment of $197,280.00.

Amount of Assessment on Double Liability of Stockholders

48. In the absence of any proof in the record as to the value of the Bank assets and in view of the presumption of the solvency of all stockholders of the Bank [45] the value of [fol. 149] the claim for the balance due from the respective stockholders for the respective sums distributed to them is fixed at $120.00, with accrued interest at 6 per cent, as to each share. The number of shares for which there was no settlement is 1569, thereby fixing the assets at *$188.280.00* with accrued interest at 6 per cent from the date of the judgment.[46]

---

[45] There was no proof as to the insolvency or solvency of any of the stockholders receiving distributions. In the absence of such proof it will be presumed such stockholders were solvent and able to pay their debts when due. Webb v. Eutaw, 63 So. 687; Sherman v. Smith, 185 Iowa 654, 169 N. W. 216; Zell v. Bankers' Utilities Co., Inc., 9 Cir., 77 F. (2d) 22; City of Tacoma v. Peterson (Wash.) 25 P. (2d) 1034.

[46] W. B. Johnston's estate on February 21, 1938, paid $4,000.00 for release of secondary liability on 64 shares of stock. This will be considered elsewhere in connection with defendant Oven, and Oven may not be charged with the assessment on the 64 shares he purchased from W. B. Johnston as Johnston's estate made settlement for that stock, paying $4,000.00. If any additional assessment be made hereafter then such assessment may be credited to such payment.

49. Crediting this value, there is a balance of $9,000.00 with interest at 6 per cent from October 29, 1937, the date of plaintiffs' judgment

50. The value of the claim against the directors on the third cause would not increase the amount of the Bank assets as $240,000.00, the amount of the distribution and interest thereon is all that may be recovered from either the directors or the stockholders, or from both.

51. There was other indebtedness of the Bank arising from the guarantee of the Bank assets consisting of $8,591.48 (Finding 6) and $16,621.66 restored to the Bank by certain stockholders (Finding 45). These items with the item of the preceding finding and court cost of $78.10 on the judgment, totals $34,291.24. An assessment of $15.17 per share is necessary as to each share for the payment of the recovery allowed on the second cause of action.

52. The liability of the defending shareholders on the first cause of action is to be computed at $120.00 per share on each share of stock owned as shown by Finding 13, with interest at 6 per cent from the date of the judgment, with the exception of D. J. Oven. Of the 570 shares held by Oven, Clara M. Oven owned 65, T. E. Vessels 105, N. E. Crumpacker 51, and Oven 349. Distribution was made by Oven in accord with such ownership and recovery against the respective owners should be on that basis. Those stockholders who restored or returned certain funds to the Bank as shown by Findings 6 and 45 shall be credited with said sums on this liability. Oven in chargeable with the amount [fol. 150] of the shares he received from his mother's estate for the stock in her name.

53. The liability of the shareholders on the second cause of action for the assessment is to be computed as to the shares held by each on November 26, 1929. Those stockholders who transferred their stock within the sixty-day period thereto are liable, computed on the same basis. So M. C. Garber is charged, with Oven, for 125 shares transferred by him to Oven and N. E. Crumpacker, with Oven, on the 51 shares bought by Oven for him.

54. All parties with whom settlement has been made are relieved from any assessment; and Oven may not be

charged with the assessment on the 64 shares purchased from Johnston as Johnston's estate has made settlement. If any additional assessment be made then the amount will be credited to such payment.

55. The respective judgments are to bear interest from the date of the judgment of the state court of October 29, 1937.

56. The costs are taxable against the respective defendants according to the ratio the judgment against each defendant bears to the total of the judgment.

57. While the directors are primarily liable to the plaintiffs for the distribution of the Bank's assets, there will be no execution issued against such directors by reason of that liability until the plaintiffs have exhausted their remedy against the stockholders of the Bank or until further order of the court.

58. The Court will retain jurisdiction to control any execution against the directors upon their liability as directors, and for the further purpose of making additional assessments against stockholders upon their double liability if it appears proper or necessary.

Done on this 9th day of August, 1943.

Bower Broaddus, U. S. District Judge.

[File endorsement omitted.]

[fol. 151] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—September 16, 1943

The following proceedings before the Honorable Bower Broaddus, United States District Judge:

On this 16th day of September, 1943, the parties appear by their respective counsel, and this cause is called for entry of judgment and correction of findings of fact. The plaintiffs ask and are granted leave to introduce additional documentary evidence, and the defendants in the third cause ask and are granted leave to introduce additional documentary evidence on notice and proof of publication of

liquidation. Certain findings of fact are corrected, and it is ordered by the Court that said findings be refiled as of this date. The parties are directed to agree on the form of judgment, or present the matter to the Court by September 17, 1943, if disagreed.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed September 16, 1943

This cause came regularly on for trial on February 25, 1943, the evidence was heard and was argued by counsel and taken under advisement; thereafter findings of fact and conclusions of law were made and filed herein on August 10, 1943; and, now, September 16, 1943, this cause comes regularly on for judgment.

For clarity and to make way for brevity, hereafter the decree is set forth in four principal parts, viz: Part A—on the First Cause of Action; Part B—on the Second Cause of Action; Part C—on the Third Cause of Action; and Part D—General Provisions. Judgments rendered on the first cause of action are set forth in separately numbered paragraphs (1) to and including (10), under the designation: "Part A—on the First Cause of Action," and this will be understood without repetition, in each of such numbered paragraphs, of the statement that such judgment is on the first cause of action. Similarly, judgments rendered on the second cause of action are set forth in separately numbered paragraphs (11) to and including (24), under the designation: "Part B—on the Second Cause of Action," and this will be understood without repetition, in each of such numbered paragraphs, of the statement that such judgment is on the second cause of action. Similarly, judgments rendered on the third cause of action are [fol. 152] set forth in separately numbered paragraphs (25) to and including (27), under the designation: "Part C, on the Third Cause of Action," and this will be understood without repetition, in each of such numbered paragraphs, of the statement that such judgment is on the third cause of action. Set forth under the designation: "Part D—General Provisions," are various provisions and judgments set forth in separately numbered paragraphs (28) to

and including (34), affecting, as indicated therein, various of the judgments rendered herein.

And, now, on September 16, 1943, It Is

Part A—on the First Cause of Action:

(1) Ordered, Adjudged and Decreed that plaintiffs do have and recover of and from each of the following named defendants, severally and not jointly, the amounts set opposite their names, viz:

Name	Amount
Burchard Denker	$2,301.71;
R. R. Kisner	1,146.39;
J. M. Gentry	2,889.85;
Gloyrene Gentry Hoehn	2,889.85;
D. J. Oven	32,746.44;
G. E. Munger	1,834.22;
Florence Gannon Lovell	2,407.30;
G. E. Hudson	1,200.00;
Faith W. Crumpacker	2,627.13;
N. E. Crumpacker	25,168.10;
C. F. Randolph	6,688.53;

together with interest on each of said sums at 6% per annum from October 29, 1937, until paid; And It Is Further

(2) Ordered, Adjudged and Decreed that, in addition to the sum for which judgment is rendered in paragraph numbered (1) hereof, plaintiffs do have and recover of and from the defendants Florence Gannon Lovell and Ruth Munger, nee Cannon, and each of them, the sum of fourteen thousand nine hundred and three dollars ($14,903.00), together with interest thereon at 6% per annum from October 29, 1937, until paid, and it is further ordered, adjudged and decreed that the aggregate satisfaction to be obtained from either [fol. 153] or both the above named defendants on the judgment rendered in this paragraph shall not exceed $14,903.00 with interest as above stated; and It is Further

(3) Ordered, Adjudged and Decreed that, in addition to the sum for which judgment is rendered in paragraph numbered (1) hereof, plaintiffs do have and recover of and from the defendant D. J. Oven the sum of Twelve Thousand Two Hundred Nine Dollars and Thirty-Eight cents ($12,209.38), together with interest thereon at 6% per annum from October 29, 1937, until paid; and It Is Further

(4) Ordered, Adjudged and Decreed that plaintiffs do have and recover nothing against the defendant R. L. Sanford; and It Is Further

(5) Ordered, Adjudged and Decreed that plaintiffs do have and recover nothing against the defendant Florence Lovell, as Administratrix of the Estate of Katie Gannon, deceased; and It Is Further

(6) (Eliminated)

(7) (Eliminated)

(8) (Eliminated)

(9) Ordered, Adjudged and Decreed that as to E. M. Abbott, who was a party herein and served with process, but having died and no revivor having been had and the time for revivor having expired, this action has abated; and It Is Further

(10) Ordered, Adjudged and Decreed that as to each of the judgments set forth in paragraphs numbered (1), (2), and (3), and each of them, execution may issue; and It Is Further

Part B—on the Second Cause of Action:

(11) Ordered, Adjudged and Decreed that an assessment upon the shareholders of the American National Bank of Enid, Oklahoma, to the extent of Fifteen Dollars and Seventeen Cents ($15.17) per share, to be paid within fifteen (15) days from this date, be and the same is hereby made upon [fol. 154] every share of the capital stock of said Bank as it was held of record and appeared on the books of the Bank on November 26, 1929, relieving and excepting from such assessment the following shares then of record on the books of the Bank and owned by the following persons in the amounts set opposite their names, to-wit:

Name	Number of Shares
Eugene Watrous and Irene Watrous	90
John Vater	5
Mrs. W. B. Johnston	26
George B. Roberts, Trustee	18
Albert Hirsch	98

Name	Number of Shares
Max Hirsch	98
Morris Hirsch	96
*D. J. Oven	64

[fol. 155]

Name	Number of Shares
N. E. Crumpacker	200
Joseph Weil	15
E[illegible]d. Abbott	10
R. L. Sanford	15
C. Brumfield	10
Floyd E. Felt	30
R. R. Kisner	10
Burchard Denker	20
T. E. Vessels	129
Charles K. Walker	20
R. D. Anderson	10
G. E. Hudson	10

*(the 64 shares of D. J. Oven so exempted and relieved and excepted from this assessment being the 64 shares which were transferred to him on October 6, 1929, from W. B. Johnston, and such 64 shares are relieved and excepted from this assessment or any additional assessments, if any, hereafter made except in the event assessments are hereafter made by reason of which assessments herein, including the assessment now made and all assessments hereafter made, shall exceed Sixty-Two Dollars and Fifty Cents ($62.50) per share. As to any and all such assessments which exceed $62.50 per share, then, to the extent that such assessments exceed $62.50 per share, the aforesaid 64 shares so held in the name of D. J. Oven shall not be relieved or excepted, but same shall to that extent be subject to assessment); and as to the other shares above listed, same are relieved and excepted from this assessment or any assessment, if any, hereafter made; and, after relieving and excepting the foregoing shares, there remain and are hereby subjected to the above assessment the shares of record on the books of the Bank on the above date and owned and of record in the names of the following persons in the amounts set opposite their names, to-wit:

Name	Number of Shares
Ed Klein	100
G. E. Munger	16
Florence Gannon Lovell	21
F. C. Klossner	10
Clara M. Oven	45
C. E. Gannon	130
*D. J. Oven	506
Kathryn Vessels	30
Bess C. Felt	10
Faith W. Crumpacker	25
J. M. Gentry	27½
Glowrene Gentry Hoehn	27½
C. F. Randolph	80

*(the 506 shares so assessed in the name of D. J. Oven being the shares then of record in his name other than the 64 shares hereinabove in this numbered paragraph exempted and excluded from this assessment); and it is further ordered, adjudged and decreed that the aforesaid sums so assessed shall, as to any of same not paid within such fifteen-day period, bear interest at the rate of 6% per annum from and after October 1, 1943, as to so much of such assessments, if any, as are not paid by said date; and it is further ordered, adjudged and decreed that such assessment be and same is hereby made against each of the persons above listed as owners of such shares and, in addition to the persons above listed as owners of such shares, such assessment shall be and is hereby made against the follow- [fol. 156] ing persons as indicated in sub-paragraphs (a), (b), (c), (d), (e), and (f), (which lettered paragraphs shall be deemed, in references in this decree, to be and are included in paragraph (11) hereof), viz:

(a) of the 506 shares listed in the name of D. J. Oven, the 125 shares thereof transferred on November 14, 1929, from M. C. Garber to D. J. Oven are hereby, likewise, assessed against M. C. Garber; (b) of the 125 shares mentioned in sub-paragraph (a), 30 shares thereof are hereby, likewise, assessed against C. E. Crumpacker; (c) of the 125 shares mentioned in sub-paragraph (a), 65 shares thereof are hereby, likewise, assessed against Clara M. Oven; (d) of the 506 shares listed in the name of D. J. Oven, 105 shares thereof are hereby, likewise, assessed

against T. E. Vessels; (e) the 45 shares listed in the name of Clara M. Oven, the same are hereby, likewise, assessed against D. J. Oven; (f) the 130 shares listed in the name of C. E. Gannon are hereby, likewise, assessed against Florence Gannon Lovell and Ruth Munger, nee Gannon, and each of them, severally and not jointly; and it is further

(12) Ordered, adjudged and decreed that plaintiffs do have and recover of and from each of the following named defendants, severally and not jointly, the amounts set opposite their names, viz:

Name	Amount
Burchard Denker	$303.40
R. R. Kisner	151.70
J. M. Gentry	417.18
Glowrene Gentry Hoehn	417.18
D. J. Oven	4,186.92
G. E. Munger	242.72
Florence Gannon Lovell	318.57
G. E. Hudson	151.70
Faith W. Crumpacker	379.25
N. E. Crumpacker	3,034.00
C. F. Randolph	1,213.60
R. L. Sanford	227.55

which amounts the defendants are ordered, adjudged and decreed to pay unto plaintiffs on or before October 1, 1943, [fol. 157] and as to any part not so paid the same shall bear interest at the rate of 6% per annum from October 1, 1943, until paid; and, for any of such amounts not so paid, execution may issue at any time after October 1, 1943; and it is further adjudged that upon satisfaction by any defendant of the judgment rendered against him in this numbered paragraph, the same shall constitute payment and satisfaction as to him of the assessment hereinabove made in paragraph numbered (11) hereof, as to said defendant, except as to the defendants D. J. Oven, N. E. Crumpacker, and Florence Gannon Lovell; and it is further ordered, adjudged and decreed that as to D. J. Oven payment and satisfaction by him of the judgment rendered against him in this numbered paragraph shall constitute payment and satisfaction of the assessment hereinabove made in paragraph numbered (11) hereof, only as to 276 of the 506 shares

listed to him, but not including in such 276 shares any of the shares specified in sub-paragraphs (a), (b), (c), and (d) of paragraph (11) or any of the 45 shares specified in sub-paragraph (e) of paragraph (11), which shares so not included are not the basis of the judgment rendered against D. J. Oven in this numbered paragraph, and all such shares against which assessments are made and not here included are the basis of judgments hereinafter rendered; and it is further ordered, adjudged and decreed that as to N. E. Crumpacker payment and satisfaction by him of the judgment rendered against him in this numbered paragraph shall constitute payment and satisfaction of the assessment hereinabove made in paragraph numbered (11) hereof, only as to the 200 shares there listed as being of record in his name, but shall not constitute satisfaction as to him of the assessment made as to the 30 shares specified in sub-paragraph (b) thereof, which 30 shares are not the basis of the above judgment rendered in this paragraph, but are the basis of judgments hereinafter rendered. And it is further ordered, adjudged and decreed that payment and satisfaction by Florence Gannon Lovell of the judgment rendered against her in this numbered paragraph shall constitute payment and satisfaction of the assessment made in paragraph numbered (11) hereof as to the 21 shares there listed as being of record in her name, such 21 shares being the basis of the judgment rendered in this numbered para-
[fol. 158] graph, and such payment and satisfaction shall not constitute satisfaction of the assessment as to any of the shares listed in the name of C. E. Gannon or the shares specified in sub-paragraph (f) of paragraph numbered (11) hereof, which 130 shares form no part of the basis for the above judgment rendered in this numbered paragraph, but are the basis of judgments hereinafter rendered; and it is further

(13) Ordered, adjudged and decreed that plaintiffs do have and recover of and from the defendant M. C. Garber the sum of Eighteen Hundred Ninety-six Dollars and Twenty-five Cents ($1,896.25), which amount the said defendant is ordered, adjudged and decreed to pay unto plaintiffs on or before October 1, 1943, and as to any part thereof not so paid the same shall bear interest at the rate of 6% per annum from October 1, 1943, until paid; and, for any such amount not paid, execution may issue at any time

after October 1, 1943; and it is further adjudged that upon satisfaction by said defendant of the judgment rendered against him in this numbered paragraph, the same shall constitute payment and satisfaction of the assessment hereinabove made in paragraph numbered (11) hereof as to such defendant: and it is further

(14) Ordered, adjudged and decreed that plaintiffs do have and recover of and from the defendant, D. J. Oven the sum of Eighteen Hundred Ninety-six Dollars and Twenty-five Cents ($1,896.25), which amount the said defendant is ordered, adjudged and decreed to pay unto plaintiffs on or before October 1, 1943, and as to any part thereof not so paid the same shall bear interest at the rate of 6% per annum from October 1, 1943, until paid; and, for any such amount not paid, execution may issue at any time after October 1, 1943; and it is further adjudged that upon satisfaction by said defendant of the judgment rendered against him in this numbered paragraph, the same shall constitute *payment* and satisfaction of the assessment hereinabove made against the defendant D. J. Oven as to the 125 shares specified in sub-paragraph (a) of paragraph numbered (11) hereof: and it is further

(15) Ordered, adjudged and decreed that plaintiffs do [fol. 159] have and recover of and from the defendant N. E. Crumpacker the sum of Four Hundred Fifty-five Dollars and Ten Cents ($455.10), which amount the said defendant is ordered, adjudged and decreed to pay unto plaintiffs on or before October 1, 1943, and as to any part thereof not so paid the same shall bear interest at the rate of 6% per annum from October 1, 1943, until paid; and, for any such amount not paid, execution may issue at any time after October 1, 1943; and it is further adjudged that upon satisfaction by said defendant of the judgment rendered against him in this numbered paragraph, the same shall constitute payment and satisfaction of the assessment hereinabove made against the defendant N. E. Crumpacker as to the 30 shares specified in sub-paragraph (b) of paragraph numbered (11) hereof: and it is further

(16) Ordered, adjudged and decreed that the aggregate satisfaction to be obtained by plaintiffs on the assessment made as to the 125 shares transferred on November 14, 1929, from M. C. Garber to D. J. Oven, and on the judgments ren-

dered in paragraphs number (13), (14), and (15), hereof is the sum of $1,896.25, with interest as specified, and that the aggregate satisfaction to be obtained from M. C. Garber, D. J. Oven, and N. E. Crumpacker, or any or all of them, on the judgments rendered in paragraphs (13), (14), and (15) hereof, shall not exceed the above sum, with interest as specified; and it is further

(17) Ordered, adjudged and decreed that, in addition to the sum for which judgment is rendered in paragraph number (12) hereof, plaintiffs do have and recover of and from the defendants Florence Gannon Lovell and Ruth Munger, nee Gannon, and each of them, the sum of Nineteen Hundred Seventy-Two Dollars and Ten Cents ($1,972.10), which amount the said defendants are ordered, adjudged and decreed to pay unto plaintiffs on or before October 1, 1943, and as to any part thereof not so paid the same shall bear interest at the rate of 6% per annum from October 1, 1943, until paid; and, for any of such amount not paid, execution may issue at any time after October 1, 1943, and it is further ordered, adjudged and decreed that the aggregate satisfaction to be obtained from either or both the above named de-[fol. 160] fendants on the judgment rendered in this paragraph shall not exceed $1,972.10, with interest as stated; and it is further adjudged, and decreed that upon satisfaction by said defendants, or either of them, of the judgment rendered against them in this numbered paragraph, the same shall constitute payment and satisfaction of the assessment hereinabove made in paragraph (11) hereof as to the 130 shares listed in the name of C. E. Gannon and also of the assessment made in sub-paragraph (f) thereof against such defendants; and it is further

(18) Ordered, adjudged and decreed that the plaintiffs do have and recover of and from defendant D. J. Oven the sum of Fifteen Hundred Ninety-Two Dollars and Eighty-Five Cents ($1,592.85), which amount the said defendant is ordered, adjudged and decreed to pay unto plaintiffs on or before October 1, 1943, and as to any part thereof not so paid the same shall bear interest at the rate of 6% per annum from October 1, 1943, until paid; and, for any such amount not paid, execution may issue at any time after October 1, 1943; and it is further adjudged that upon satisfaction by said defendant of the judgment rendered against him in this numbered paragraph, the same shall con-

stitute payment and satisfaction of the assessment hereinabove made in paragraph numbered (11) hereof against defendant D. J. Oven as to the 105 shares specified in sub-paragraph (d) thereof; and it is further

(19) Ordered, adjudged and decreed that plaintiffs do have and recover of and from the defendant D. J. Oven the sum of Six Hundred Eighty-Two Dollars and Sixty-Five Cents ($682.65), which amount the said defendant is ordered, adjudged and decre-d to pay unto plaintiffs on or before October 1, 1943, and as to any part thereof not so paid the same shall bear interest at the rate of 6% per annum from October 1, 1943, until paid; and for any such amount not paid execution may issue at any time after October 1, 1943; and it is further adjudged that upon satisfaction by said defendant of the judgment rendered against him in this numbered paragraph, the same shall constitute payment and satisfaction of the assessment hereinabove made in paragraph numbered (11) hereof against the 45 shares listed [fol. 161] in the name of Clara M. Oven, and, likewise, in sub-paragraph (e) thereof assessed against the defendant D. J. Oven; and it is further

(20) Ordered, adjudged and decreed that each of the following named persons, severally and not jointly, shall, on or before October 1, 1943, pay unto the plaintiffs herein the amounts set opposite their names, viz:

Name	Amount
Joseph Weil	$227.55
Floyd E. Felt	455.10
T. E. Vessels	1,956.95
R. D. Anderson	151.70
Ed Klein	1,517.00
F. C. Klossner	151.70
Kathryn Vessels	455.10
Bess C. Felt	151.70

which amounts, unless paid on or before the above date, shall bear interest at the rate of 6% per annum from and after October 1, 1943, until paid; and it is further ordered, adjudged and decreed that the plaintiffs herein be and they are hereby authorized to take all necessary proceedings, by suit or otherwise, to enforce payment of the fore-

going and to recover from such persons, and each of them, the aforesaid sums in this paragraph stated, together with interest as specified; and it is further

(21) Ordered, adjudged and decreed that, in addition to the amount specified in paragraph numbered (20) hereof, T. E. Vessels shall, on or before October 1, 1943, pay unto the plaintiffs herein the sum of Fifteen Hundred Ninety-two Dollars and Eighty-five Cents ($1,592.85), which amount unless paid on or before the above date, shall bear interest at the rate of 6% per annum from and after October 1, 1943, until paid; and it is further ordered, adjudged and decreed that the plaintiffs herein be and they are hereby authorized to take all necessary proceedings, by suit or otherwise, to enforce payment of the foregoing and to recover from T. E. Vessels the above sum in this paragraph stated, with interest as specified; and it is further adjudged that upon payment and satisfaction by T. E. Ves-[fol. 162] sels of the amount in this numbered paragraph required to be paid by him, that the same shall constitute payment and satisfaction of the assessment as to the 105 shares made against him in sub-paragraph (d) of paragraph numbered (11) hereof; and it is further

(22) Ordered, adjudged and decreed that the aggregate satisfaction to be obtained by plaintiffs on the assessment made as to the 105 shares held in the name of D. J. Oven for T. E. Vessels and on the judgments rendered in paragraphs numbered (18) and (21) hereof is the sum of $1,592.85, with interest as specified, and that the aggregate satisfaction to be obtained from D. J. Oven and T. E. Vessels, or either or both of them, on the judgments rendered in paragraphs numbered (18) and (21) hereof shall not exceed the above sum, with interest as specified; and It Is Further

(23) Ordered, Adjudged and Decreed that plaintiffs do have and recover nothing against the defendant Florence Lovell, as administratrix of the estate of Katie Gannon, deceased; and It Is Further

(24) Ordered, Adjudged and Decreed that jurisdiction be and it is hereby retained and reserved as to all matters pertaining to the necessity of and the making and the enforcement of additional assessments against shareholders and those liable therefor; and It Is Further

Part C—on the Third Cause of Action:

(25) Ordered, Adjudged and Decreed that plaintiffs do have and recover of and from the defendants D. J. Oven N. E. Crumpacker, C. F. Randolph, and R. L. Sanford, and each of them, the sum of One Hundred Eighty-eight Thousand Two Hundred Eighty Dollars together with interest thereon at 6% per annum from October 29, 1937 until paid, and it is further ordered, adjudged and decreed that the aggregate satisfaction to be obtained from either or all the above four named defendants on the judgment rendered in this paragraph shall not exceed the sum of One Hundred Eighty-eight Thousand Two Hundred Eighty Dollars, with interest as above stated, plus $78.10, as above stated; and It Is Further

[fol. 163] (26) Ordered, Adjudged and Decreed that the aggregate satisfaction to be obtained by plaintiffs from each, every, and all the assessments and judgments rendered in this decree shall not exceed the sums specified in paragraph numbered (25) hereof, with interest as specified therein; and it is further adjudged that any and all sums collected on any of the assessments and judgments rendered herein from and including paragraph numbered (1) to and including paragraph numbered (24) hereof, in addition to being credited in accordance with provisions herein elsewhere set forth, shall be credited on the judgment rendered in paragraph numbered (25) hereof; and it is further ordered, adjudged and decreed that no execution may be issued on the judgment rendered in paragraph numbered (25) hereof until plaintiffs have exhausted their remedy on the assessments made and judgments rendered herein from and including paragraph numbered (1) to and including paragraph numbered (24) hereof, or until plaintiffs have shown good cause for failure so to do or until the further order of this Court; and jurisdiction is hereby retained and reserved and to control the issuance of execution on the judgment rendered in paragraph numbered (25) hereof; and It Is Further

(27) Ordered, Adjudged and Decreed that as to the defendant Faith W. Crumpacker, determination and decision has not yet been made as to her liability on the third cause of action, and as to the third cause of action, jurisdiction is retained and decision is reserved for determination here-

after of the liability as to defendant Faith W. Crumpacker; and It Is Further

Part D—General Provisions:

(28) Ordered, Adjudged and Decreed that the aggregate satisfaction to be obtained by plaintiffs from the D. J. Oven judgments rendered against said defendant in paragraphs numbered (3) and (19) hereof shall not exceed the sum of $18,000.00, with interest thereon at 6% per annum from October 29, 1937, until paid; and It Is Further

[fol. 164] (29) Ordered, Adjudged and Decreed that the aggregate satisfaction to be obtained by plaintiffs from Florence Gannon Lovell on the judgments rendered against said defendant in paragraphs numbered (2) and (17) hereof, shall not exceed $16,500.00 with interest thereon at 6% per annum from October 29, 1937, until paid; and It Is Further

(30) Ordered, Adjudged and Decreed that the aggregate satisfaction to be obtained by plaintiffs from Ruth Munger, nee Gannon, on the judgments rendered against said defendant in paragraphs numbered (2) and (17) hereof, shall not exceed $16,500.00 with interest thereon at 6% per annum from October 29, 1937, until paid; and It Is Further

(31) (Eliminated.)

(32) Ordered, Adjudged and Decreed that the aggregate satisfaction to be obtained by plaintiffs from all assessments made and judgments rendered herein from paragraphs numbered (1) to and including (25) hereof, shall not exceed One Hundred Ninety Seven Thousand Sixty Dollars and 80 cents, with interest thereon at 6% per annum from Feb. 21, 1938, until paid, plus $78.10; and it is further adjudged that whenever such amounts have been obtained by plaintiffs from any or all the above assessments and judgments rendered herein, then each, every, and all such assessments and judgments, and every part thereof, shall be satisfied as to each, every, and all of the defendants, and as to each, every and all of the shareholders of the Bank, and as to each, every, and all the persons named herein, and at such time and thereupon the affairs of the American National Bank of Enid, Oklahoma, of

every character shall be deemed wound up, closed, and ended; and It Is Further

(33) Ordered, Adjudged and Decreed as to the persons named in the hereinafter set forth form of Notice and Demand, demand for payment of their herein adjudged liability shall be made as follows: that, within five (5) days from this date, some one of the plaintiffs shall file with the Clerk of this Court an affidavit, giving the last known address, according to the best information obtainable by plaintiffs, of each of the persons specified in the hereinafter [fol. 165] set forth form of Notice and Demand; and the Clerk of this Court shall thereupon mail to each of such persons so listed in such form, in an envelope addressed to such persons at the address as given in such affidavit so to be filed, a Notice and Demand in substantially the following form, viz:

(Form of Notice and Demand)

(Give the caption of this cause as it appears at the heading of this Journal Entry)

To each and all of the persons whose names are set forth in the itemized lists in the following notice and demand:

Notice and Demand

Whereas, in the above entitled action pending in this Court, brought by plaintiffs for, among other purposes, the enforcement of the liability of the shareholders of the American National Bank of Enid, Oklahoma, and others, to restore $240,000.00, which was, in December, 1929, distributed to the shareholders of said Bank at the ratio of $120.00 per share; and for the assessment and recovery of the individual liability of the shareholders of said bank for the payment of the debts of the Bank, and for application of the aforementioned recoveries to payment of a judgment of $249,000.00, with interest thereon at 6% from October 29, 1937, plus $78.10 costs, which plaintiffs had theretofore obtained against said Bank, and which was wholly unpaid; and, whereas, a final judgment and decree was, on September 16, 1943, made and entered herein, whereby, on the second cause of action, the following named persons were ordered to, on or before October 1, 1943, pay

unto the plaintiffs named in the above caption to this notice the amount set opposite their names as follows, to-wit:

Name	Amount
Joseph Weil	$ 227.55
Floyd E. Felt	455.10
T. E. Vessels	3,549.78
R. D. Anderson	151.70
Ed. Klein	1,517.00
F. C. Klossner	151.70
Kathryn Vessels	455.10
Bess C. Felt	151.70

[fol. 166] such amounts, if not sooner paid, to bear interest at 6% per annum from October 1, 1943, until paid; and

Whereas, the above judgment and decree contained further provisions requiring the giving of this Notice and Demand.

Now, Therefore, by virtue of the foregoing and of the law applicable thereto, demand and requisition upon the above named persons, and each and every one of them, is hereby made for payment unto the above named plaintiffs of the foregoing sums, with interest as stated; and notice is hereby given that the above named plaintiffs are by said judgment and decree further authorized to take all necessary proceedings, by suit or otherwise, to enforce and recover to the extent above stated the aforesaid liability of such persons; and you, and each of you are further notified that all remittances and payments hereunder should be made payable to plaintiffs above named, and may be mailed, transmitted or delivered to Ralph Crews at Room 534 Bass Building, Enid, Oklahoma.

In Witness Whereof, I have hereunto set my hand and caused the seal of this Court to be affixed to this Notice and Demand, at the City of Oklahoma City, Oklahoma, this — day of —, 1943.

—— ——, Clerk of the United States District Court for the Western District of Oklahoma.

Such notice and demand to be signed and dated the day of mailing; and the Clerk shall keep a record of his compliance with the foregoing and, if any of the envelopes containing such notice and demand be returned to the Clerk unde-

livered to any such addressee, the Clerk shall, likewise keep a record thereof, and within 15 days from the date of mailing such notices, the Clerk shall make and file in this cause a [fol. 167] statement showing his action under this paragraph hereof and listing the envelopes, if any, that have been returned, and shall mail a copy of such statement to counsel for plaintiffs; and counsel for plaintiffs are hereby directed to supply the Clerk with a sufficient number of copies of the foregoing form of Notice and Demand for his use in complying herewith; and It Is Further

(34) Ordered, Adjudged and Decreed that the costs of this action, to-wit, the sum of $138.67, be, and same are hereby taxed against the defendants Burchard Denker, R. R. Kisner, D. J. Oven, Glowrene Gentry Hoehn, J. M. Gentry, Florence Gannon Lovell, Ruth Munger, nee Gannon, G. E. Munger, R. L. Sanford, G. E. Hudson, N. E. Crumpacker, Faith W. Crumpacker, C. F. Randolph, and M. C. Garber, and that the costs, as aforesaid, be and same are hereby apportioned among such defendants at the following ratio, that is to say, divide such costs into 1176 parts, and the part taxed against each defendant shall be and is hereby fixed at the parts of 1176 set opposite the name of each, as follows, to-wit:

Name	Parts
Burchard Denker	20
R. R. Kisner	10
D. J. Oven	465
Glowrene Gentry Hoehn	27.5
J. M. Gentry	27.5
Florence Gannon Lovell	65
Ruth Munger, nee Gannon	65
G. E.Munger	16
R. L. Sanford	15
G. E. Hudson	10
N. E. Crumpacker	226
Faith W. Crumpacker	25
C. F. Randolph	80
M. C. Garber	125

and it is further ordered adjudged and decreed that as to any defendant who does not within 15 days from this date [fols. 168-210] pay his proportionate part of the above

costs, that execution may issue against such defendant therefor.

Bower Broaddus, U. S. District Judge.

OK

A. F. Moss, Christy Russell, M. F. Priebe, Attorneys for Plaintiffs.

OK as to form

Simons-McKnight, Simons, Mitchell & McKnight, Attorneys for Florence Gannon Lovell, G. E. Munger, Florence Lovell, Administratrix of the estate of Katie Gannon, deceased, R. L. Sanford, G. E. Hudson, N. E. Crumpacker, C. F. Randolph, M. C. Garber, Ruth Munger, nee Gannon.

OK as to form

Scarritt & Champlin, Attorney for D. J. Oven, Glowrene Gentry Hoehn, J. M. Gentry.

OK as to form

Harry O. Glasser, Attorney for Burchard Denker.

OK as to form

Ted R. Moore, Attorney for Robert Lee Kisner, Administrator of Estate of R. R. Kisner, deceased.

[File endorsement omitted.]

[fol. 211] **Exhibits**

PLAINTIFFS' EXHIBIT 1

Agreement

This Agreement made and entered into this the 25th day of November, 1929, by and between the American National Bank of Enid, Oklahoma, a National banking association organized and existing under the laws of the United States, hereinafter referred to as first party, and the First National Bank of Enid, Oklahoma, a National banking association organized and existing under and by virtue of the laws of the United States of America, hereinafter referred to as second party, Witnesseth:

Whereas, First party is desirous of disposing of its business and of going into voluntary liquidation, and to that end has been negotiating with the second party; and,

Whereas, second party is now willing to assume and agree to pay the liabilities to creditors of first party, and is further willing to purchase and take over from first party in connection with the assumption of the liabilities of first party such of the assets of first party as shall have been acceptable to and approved by the Board of Directors of said second party; and,

Whereas, first party represents that it has been authorized by the agreement of shareholders owning over two-thirds of its capital stock, also by its Board of Directors in a meeting properly held to enter into this agreement, and,

Whereas, second party represents that it has been legally authorized by its Board of Directors in a meeting properly held to enter into this agreement:

Now, Therefore, in consideration of the premises, the mutual benefits which the parties hereto deem will accrue to each of them, and the respective agreements and things herein contained and herein provided to be kept, performed, and done, the parties hereto hereby agree as follows:

First. Party of the first part shall cause to be prepared a statement of its condition as at the close of business on the 25th. day of November, 1929, showing in detail its re- [fol. 212] sources and liabilities as of said date, such statement to be certified as to accuracy by an active officer of first party, and delivered on said date to second party, and shall be attached hereto, marked Exhibit A., and by such attachment shall become a part hereof.

Second. First party hereby represents and warrants to second party that the said statement discloses the true condition of first party and that the assets enumerated therein and transferred hereunder are genuine; also that the liabilities enumerated therein constitute all of the liabilities and obligations of first party on said date.

Third. Second party shall at the close of business on the 25th. day of November, 1929 take over, assume, and become liable for the payment of the following liabilities of first party in the amounts respectively shown by the aforesaid statement, and as the same appear on the books of first party.

1. All individual deposits of first party as shown by Exhibit A. hereto attached and as further itemized and

shown in the list hereto attached marked Exhibit B., aggregating 744,587.40 Dollars.

2. All Certificates of Deposit of first party as shown by Exhibit A. hereto attached and as further itemized and shown in a list hereto attached marked Exhibit C., aggregating 230,909.88 Dollars.

3. All savings deposits of first party as shown by its books and Exhibit A. hereto attached, and as further itemized and shown in list hereto attached marked Exhibit D., aggregating 136,008.45 Dollars.

4. All amounts due to banks, bankers and trust companies as shown by Exhibit A. hereto attached, and as further itemized and shown in list hereto attached marked Exhibit E., aggregating 172,364.87 Dollars.

5. All certified checks and cashier's checks of first party as shown by Exhibit A. hereto attached, and as further itemized and shown in list hereto attached marked Exhibit F., aggregating 6,978.22 Dollars.

6. All bills payable and re-discounts of first party as shown by Exhibit A. hereto attached, and as further item-
[fol. 213] ized and shown in list hereto attached marked Exhibit G., aggregating 64,000.00 Dollars.

Total 1,354,848.82 Dollars.

Second party further agrees to assume and pay all interest, if any, accrued to the date hereof on the aforesaid liabilities of first party.

The liabilities and obligations above enumerated shall constitute the sole and only liabilities and obligations of first party which second party shall assume hereunder.

First party hereby agrees to sell, assign, transfer, convey, set over, and deliver to second party, and second party agrees to purchase from first party, effective at the close of business on the said 25th. day of November, 1929, the said assets owned by first party on said date as follows:

1. All actual cash on hand as verified and accepted by second party, amounting to 37,127.21 Dollars.

2. All cash items on hand acceptable to and approved by second party, as per itemized list attached hereto marked Exhibit H., amounting to 2,256.95 Dollars.

3. All amounts then owing from banks, bankers, or trust companies evidenced by drafts drawn thereon and delivered hereunder, as per itemized list hereto attached and marked Exhibit I., amounting to 152,815.36 Dollars.

4. The certain bonds, warrants, and securities acceptable to and approved by second party at the then face value thereof, as per itemized list hereto attached and marked Exhibit J., amounting to 391,835.86 Dollars.

5. The certain bills receivable or loans and discounts acceptable to and approved by second party at the face value thereof, as per itemized list hereto attached and marked Exhibit K., amounting to 904,669.77 Dollars.

6. The certain overdrafts acceptable to and approved by second party, as per itemized list hereto attached, marked Exhibit L., amounting to 943.67 Dollars.

7. Furniture and fixtures and equipment owned by first party, at the agreed price of 23,000.00 Dollars.

[fol. 214] 8. Stock in the Federal Reserve Bank of Kansas City, Missouri, amounting to 7,200.00 Dollars.

9. All of first party's trust business, including good will, equipment, etc.

Total 1,519,848.72 Dollars.

First party hereby guarantees that it has had non-interest bearing deposits during the preceding ninety day period of $700,000.00.

First party hereby agrees to pay all taxes assessed or levied, accrued and to accrue subsequent to the year 1930, and shall defend and hold harmless second party against all claims, suits and judgments rendered or to be rendered against first party.

First party agrees that its unimpaired capital, surplus, and profits at the close of business November 25th., 1929 shall be not less than $265,000.00.

For and in consideration of the foregoing party of the second part agrees to pay first party or its authorized agent or agents the sum of $350,000.00, and in the manner following:

$10,000.00 by disclaimer of any right, title, or interest in the item known and carried on the books of first party as "other real estate."

$240,000.00 payable as follows:—Upon delivery and assignment of all personal property described herein; upon execution and delivery to second party of a satisfactory conveyance of 100/204 interest in the building known as the American National Bank Building and the commercial building adjacent thereto on the north, all being subject to an incumbrance of not more than $135,000.00.

Upon delivery properly assigned of one hundred shares of the capital stock of the American National Building Company.

Upon the execution and delivery of satisfactory lease on said banking room for the period of seven years at an annual rental of $7,200.00 per year.

The real estate named herein to be conveyed being de- [fol. 215] scribed as the south one hundred feet of Lots Sixteen (16), Seventeen (17), eighteen (18), Nineteen (19), in Block Twenty-eight (28), Jonesville, now an addition to the City of Enid, Oklahoma.

$100,000.00 due and payable subject to and under guaranty clause hereinafter set out.

First party hereby unequivocally and irrevocably guarantees the payment of all of its evidences of debt which are to be transferred and assigned under and by virtue of this agreement at maturity or within thirty days thereafter, and such notes maturing before January first, 1930, which in emergency cases only may be renewed for a period of thirty days under the terms and conditions of this guaranty.

First party's guaranty as to first mortgage real estate notes running for one year or longer, shall be limited to January first, 1930.

First party *agree* that as an earnest of the foregoing undertaking that second party shall withhold payment of the sum of $100,000.00 of the consideration hereinbefore set out and shall exercise joint control with T. E. Vessels of such fund until this undertaking shall have been fulfilled to the satisfaction of second party, and should said sum prove insufficient the stockholders of first party acknowledge and confess their liability under Section 2 of Section 5220 of the National Banking Act.

It is understood and agreed however, that the personal guaranty of the stockholders of first party shall expire by limitation on May 25th., 1930.

The term, face value, as used above shall be understood for the purpose of this agreement to represent the principal

amount of any bond, note, or other evidence of debt, exclusive of any accrued but uncollected interest, or interest collected but not earned thereon.

First party hereby warrants the genuineness of all notes or bills receivable, bonds, warrants, and accounts transferred hereunder, and of all collateral, chattels, and instruments evidencing collateral or other security to all assets transferred hereunder.

It is understood and agreed by and between the parties [fols. 216-225] hereto that second party assumes only the certain and specified liabilities of first party hereinbefore enumerated, and that second party does not assume any liability of first party to its stockholders as such; and first party hereby warrants that it has no liabilities other than those shown by its books and the statement hereto attached marked Exhibit A., and in the event any other liabilities should develop first party hereby binds itself, its successors, or assigns to hold second party harmless by reason thereof.

First party hereby agrees to take the necessary steps immediately after the execution of these presents to surrender the stock in the Federal Reserve Bank of Kansas City, Missouri, and to deliver the proceeds thereof to second party.

First party further agrees and binds itself immediately after the execution and delivery of this agreement to take the necessary legal steps to call and hold a formal shareholders' meeting for the purpose of going into voluntary liquidation.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their respective officers thereunto, duly authorized, and their respective corporate seals to be hereunto affixed and duly attested at Enid, Oklahoma the day and year first above written.

American National Bank, Enid, Oklahoma. By T. E. Vessels, President. First Party. (Seal.)

Attest: Floyd E. Felt, Cashier. The First National Bank of Enid, Oklahoma. By Fred C. Champlin, Vice-President. (Seal.)

Attest: A. F. Butts, Cashier.

[fol. 226] PLAINTIFFS' EXHIBIT 8

On Page 279-280-281 of the Minute Book of the American National Bank, the following appears:

[fol. 227] Minutes of the Board of Directors of the American National Bank, Enid, Oklahoma, November 25, 1939

The Board of Directors of the American National Bank of Enid, Oklahoma, met on the date above mentioned with the following directors present:

N. E. Crumpacker
Albert Hirsch
T. E. Vessels
D. J. Oven
R. L. Sanford
C. F. Randolph
Floyd E. Felt

A majority of the Board being present, the meeting was called to order by Chairman N. E. Crumpacker, who presided, with Floyd E. Felt, Secretary of the Board of Directors, acting as Secretary of the meeting.

The minutes of the meeting of the Board of Directors held on October 18, 1929, were read and upon regular motion duly seconded and carried the minutes were approved.

All loans made and renewed from October 18, 1929, to this date were read and discussed at length by the Board, and, after due consideration upon regular motion duly seconded and carried said loans were approved, as shown by the bills receivable ledger from No. 11,571 to No. 11,940, as shown by the said register.

All loans made to Directors or firms or corporation in which directors are interested were read, as below listed, and upon regular motion duly seconded and carried the said loans were approved.

No. 11,577, C. F. Randolph,	$3,000.00
No. 11,625, D. J. Oven,	1,700.00
No. 11,750, C. F. Randolph,	2,000.00
No. 11,782, N. E. Crumpacker,	1,000.00
No. 11,889, T. E. Vessels,	1,500.00

The expense account of the bank from October 18, 1929, to date was read in detail, as shown by the Distribution and Expense Book and the several items therein contained

discussed at length. All of the items appearing regular and necessary for the proper conduct of the bank's business, [fol. 228] upon regular motion duly seconded and carried, said expense account was approved as read.

It was called to the attention of the Board that there were three vacancies on our Board of Directors and by action of the Board the following were appointed to fill out the unexpired terms of the Directors, who had resigned or ceased to be Directors for other reasons:

Kathryn Vessels to fill unexpired term of F. J. Gentry;

Faith W. Crumpacker to fill unexpired term of F. M. Belville;

Bess C. Felt to fill unexpired term of W. B. Johnson.

The persons above named have qualified as Directors and their oaths of office forwarded to the Honorable Comptroller of the Currency, Washington, D. C.

The matter of the sale of the assets of this bank and the assuming of the liabilities by the First National Bank of Enid, Oklahoma, was discussed at length by the Board, after which T. E. Vessels presented the following resolution, which was seconded by Albert Hirsch, the said resolution being unanimously adopted:

"Whereas, shareholders owning more than two-thirds of the capital stock of the American National Bank of Enid, Oklahoma, have given their consent in writing to the liquidation of said bank, and have authorized this Board of Directors and the appropriate officers of said bank to proceed forthwith toward the disposition of the current business of said bank and to do such other things as may be necessary in the liquidation of its affairs, and

"Whereas, tentative arrangements have been agreed upon for the liquidation of said bank through the First National Bank of Enid, Oklahoma, in accordance with the terms and provisions of a certain agreement which has been prepared for that purpose, and

"Whereas, a copy of the proposed agreement having been submitted to and carefully considered by the members of this Board present at this meeting, it is their unanimous opinion that said agreement is satisfactory in its terms and [fol. 229] provisions, should be approved, and that its execution and delivery should be authorized.

"Now, therefore, be it resolved that the President or Vice-President and Cashier of this bank be and they are hereby authorized, empowered and directed, on behalf of

this bank, to execute, enter into and make delivery of the said agreement between this bank and the First National Bank of Enid, Oklahoma, which provides among other things, for a transfer of all of this bank's liabilities to creditors to said First National Bank of Enid, Oklahoma, the purchase of certain assets of this bank by said First National Bank of Enid, Oklahoma, and for the voluntary liquidation of this bank, and that the said President or Vice-President and Cashier be and they are hereby further authorized, empowered, and directed to do any and all other things which may be necessary and essential in carrying out any and all of the provisions of this agreement.

"Be it further resolved that the appropriate officers of this bank be and they are hereby empowered and directed to make proper transfer and conveyance, by deed, assignment, other written instruments or by endorsement of any and all property belonging to this bank of every kind and character and wheresoever situated, as contemplated by said agreement."

C. F. Randolph offered the following resolution which was seconded by D. J. Oven and the said resolution was adopted unanimously:

"Whereas, the American National Bank of Enid, Oklahoma, contemplates disposing of its current business and thereafter going into voluntary liquidation and to that end has entered into an agreement for the sale of certain of its assets to the First National Bank of Enid, Oklahoma, including its real estate owned; now, therefore,

"Be it resolved that the President and Cashier of this bank be and they are hereby authorized, empowered and directed to convey to the said First National Bank of Enid, Oklahoma, by warranty deed, all of the real property owned by this bank, more particularly described as follows:

"An undivided One Hundred Two Hundred Fourths in- [fol. 230] terest in and to the South 100 feet of lots 16-17-18-19, Block 28, Jonesville Addition to the City of Enid, Oklahoma."

Matters of general welfare were discussed at length by the Board.

No further business appearing, upon regular motion duly seconded and carried, the meeting adjourned.

We, the undersigned Chairman and Secretary of the Board of Directors of the American National Bank of Enid, Oklahoma, do hereby certify that the foregoing is a true, correct and complete record of the proceedings of the Board of Directors held on the date above mentioned.

(Signed) N. E. Crumpacker, Chairman; Floyd E. Felt, Secretary.

On Pages 282 and 283 of the Minute Book of the American National Bank, the following appears:

Meeting of the Stockholders of the American National Bank, Enid, Oklahoma.

December 20, 1929.

The Stockholders of the American National Bank of Enid, Oklahoma, met on the date above mentioned with the Stockholders representing the number of shares set opposite their respective names present at the said meeting;—

N. E. Crumpacker	representing	200	shares;
T. E. Vessels	do	129	do;
Floyd E. Felt	do	30	do;
D. J. Oven	do	570	do;
Albert Hirsch	do	98	do;
R. L. Sanford	do	15	do;
Eugene Watrous	do	90	do;
C. F. Randolph	do	80	do;

Eugene Watrous held the proxy of the following, representing the number of shares set opposite their respective names:

[fol. 231] R. D. Anderson	owner of	10	shares;
R. R. Kisner	do	10	do;
E. M. Abbott	do	10	do;
John J. Vater	do	5	do;
Kathryn Vessels	do	30	do;
C. E. Gannon	do	130	do;
Glowrene G. Hoehn	do	27½	do;

Total number of shares represented at this meeting 1434½ shares.

The number of shares of stock not represented at this meeting was—565½ shares.

Total number of shares 2,000.

The Stockholders' meeting was presided over by T. E. Vessels, President of the American National Bank of Enid, Oklahoma, who turned the meeting over to N. E. Crumpacker, who presided at the said meeting.

Floyd E. Felt was elected Secretary of the meeting and acted in this capacity during the meeting.

The Chairman advised that the stock represented at the meeting was in excess of the two thirds as required by law and the meeting then proceeds to the transaction of business.

Mr. Vessels gave a verbal report of the sale of the assets etc., of the American National Bank of Enid, Oklahoma, to the First National Bank of Enid, Oklahoma, and read in detail the Stockholders' agreement entered into authorizing said sale and reported that said agreement was signed by Stockholders representing more than two thirds of the stock of said bank.

Mr. R. L. Sanford introduced the following resolution, which was seconded by Eugene Watrous:—

"Resolved that the American National Bank of Enid, Oklahoma, be placed in voluntary liquidation under the provision of Sections 5220 and 5221 of the United States Revised Statutes to take effect immediately, and that T. E. Vessels be appointed Liquidating Agent of said bank; that liquidation shall be conducted in accordance with law under [fol. 232] the supervision of the Board of Directors, who shall require a suitable bond to be given by said agent in an amount to be fixed by the Board of Directors:

"that said Liquidating Agent shall render semi-annual reports to the Comptroller of the Currency on the first of April and October of each year, showing the progress of said liquidation until said liquidation is completed; that said Liquidating Agent shall render an annual report to the shareholders on the date fixed in the articles of association for said annual meeting, at which meeting the shareholders may, if they see fit, by a vote representing a majority of the entire stock of the bank, remove the Liquidating Agent and appoint another in place thereof; that a special meeting of the shareholders may be called at any

time in the same manner as if the bank continued an active bank, and at said meeting the shareholders may by a vote of the majority of the stock, remove the Liquidating Agent; that the Comptroller of the Currency is authorized to have an examination made at any time into the affairs of the liquidating bank until the claims of all creditors have been satisfied, and that the National Bank Examiner will be compensated for his time and expense in making the examination in question."

The above resolution was unanimously adopted by the stockholders meeting.

Matters of general welfare were discussed at length by the stockholders present.

No further business appearing, upon regular motion duly seconded and carried, the stockholders' meeting adjourned.

We, the undersigned, do hereby certify that the foregoing is a true, correct and complete record of the proceedings of the stockholders' meeting held on the date above mentioned.

(No signature.) Chairman.

(No signature.) Secretary.

[fol. 233] On Pages 284 and 285 of the Minute Book of the American National Bank, the following appears:

Meeting of the Board of Directors of the American National Bank, Enid, Oklahoma

December 20, 1929.

Upon adjournment of the stockholders meeting, the Board of Directors met with the following Directors present:

T. E. Vessels
R. L. Sanford
C. F. Randolph
Albert Hirsch
Floyd E. Felt
N. E. Crumpacker
D. J. Oven

Directors absent:

Kathryn Vessels
Bess C. Felt
Faith Crumpacker

The meeting was called to order by Chairman N. E. Crumpacker, who presided with Floyd E. Felt acting as Secretary of the meeting.

The minutes of the meeting of the Board of Directors held on November 25, 1929, were read, upon regular motion, duly seconded and carried. The said minutes were approved as read.

Report was made by the Secretary of the meeting of the stockholders at which meeting T. E. Vessels was appointed Liquidating Agent of the American National Bank of Enid, Oklahoma, under the provisions of Sections 5220 and 5221 of the United States Revised Statutes, and that under the resolution adopted by the stockholders' meeting the amount of the bond required by the said Liquidating Agent was to be fixed by the Board of Directors.

Upon the motion of R. L. Sanford, which motion was seconded by Albert Hirsch, the bond of the Liquidating Agent was placed at the sum of $25,000.00 and the costs [fol. 234] of said bond to be paid by the American National Bank of Enid, Oklahoma, being charged as an item of expense of the liquidation of the said bank. The motion carried unanimously.

C. F. Randolph introduced the following resolution, which was seconded by R. L. Sanford:

"Whereas, after due and legal notice, the stockholders of this association owning two-thirds of the capital stock have voted and placed the association in voluntary liquidation, and

"Whereas, this vote has been duly certified to the Comptroller of the Currency and

"Whereas, under the provisions of Section 5 of the Act approved December 23, 1913, and known as the Federal Reserve Act, this association is required to surrender for cancellation all of its holdings of the capital stock of the Federal Reserve Bank of Kansas City, and to terminate its membership in said bank,

"Now, therefore, be it resolved that T. E. Vessels, the duly elected Liquidating Agent, be and he is hereby author-

ized, empowered and directed to apply to the said First National Bank for the cancellation of 144 shares of stock allotted to and held by this association, and to receive a receipt for any balance due this association by said Federal Reserve Bank on account, paid subscriptions, or otherwise and any securities or other valuables belonging to this association, and to do such acts as may be necessary to adjust and settle the account between this association and the said Federal Reserve Bank."

The above resolution was unanimously adopted.

Matters of general welfare were discussed at length by the Board. A verbal report was made by Mr. Vessels regarding the affairs of the bank and in connection with notes that have been paid or renewed by the successor of the American National Bank.

No further business appearing, upon regular motion duly seconded and carried, the meeting adjourned.

[fol. 235] We, the undersigned Chairman and Secretary of the Board of Directors of the American National Bank of Enid, Oklahoma, do hereby certify that the foregoing is a true, correct and complete record of the proceedings of the Board of Directors of the said bank held on the date above given.

(No signature) Chairman.

Floyd E. Felt, Secretary.

DEFENDANTS' EXHIBIT 1

Notice

The American National Bank, located at Enid, Okla., is closing its affairs.

All note holders and other creditors of the association are therefore hereby notified to present the notes and other claims for payment.

Floyd E. Felt, Cashier.

Dated January 20, 1930.

Notice

The First National Bank of Enid, Oklahoma, has succeeded The American National Bank of Enid, by the pur-

chase of its assets and has assumed the payment of its liabilities.

The First National Bank of Enid, by A. F. Butts, Cashier.

Affidavit of Publication

Everett L. Purcell, being duly sworn, deposes and says that he is Publisher of The Enid Events, a weekly newspaper printed and published in Garfield County, Oklahoma, having a general paid circulation therein and having an entrance into the United States mails as second class matter and published in said county where it is delivered to the United States mails. That said Enid Events has been continuously [fols. 236-279] and uninterruptedly published in said county during a period of 104 weeks consecutively prior to the first publication of notice or advertisement hereto attached without cessation. That the place of publication of said paper has not been moved, the name has not been changed and the continuity of its regular issues has not been broken. That the said Enid Events comes within all the prescriptions and requirements of House Bill No. 327 passed by the 18th Legislature of the State of Oklahoma.

That the attached notices were published in said Enid Events wholly in the regular edition, and not in a supplement, weekly for a period of eight consecutive weeks. That the first publication was on the 6th day of February, 1930, and last publication was on the 27th day of March, 1930.

Everett L. Purcell.

Subscribed and sworn to before me this 23rd day of August, 1943. Rayola Gaunt, Notary Public. My Com. Exp.: December 31, 1946. (Seal.)

Printer's Fee $——.

Plaintiff's Exhibit 116

In the District Court in and for Garfield County, State of Oklahoma. Ralph Crews, et al., Plaintiffs, versus T. E. Vessels, et al., Defendants. No. 13,225.

Amended Petition

In pursuance of the order of this court requiring them so to do, the plaintiffs, Ralph Crews, Charlie Crews, Robert

Crews, Everett Crews, Mary Willis, nee Crews and Amy Tresner, nee Crews, file this their amended petition, and complaining of the defendants, T. E. Vessels, et al., for cause of action allege and state:

* * * * * * *

[fol. 280] (14) That none of the matters and things herein alleged and set forth respecting the embezzlement, misappropriation, conversion, etc., of said deposit and/or of said "Crews Estate Oil & Gas Producers, Escrow" account, funds, money, Liberty Bonds and/or Treasury Certificates, accrued interest, proceeds thereof, etc., or of the failure of said Banks, and each of them, and their officers and directors, and each of them, to faithfully, honestly and diligently perform the duties incumbent upon them, were discovered by these plaintiffs, or any of them, until within approximately one year next preceding the commencement of this action, and these plaintiffs, and none of them, knew or had any knowledge or notice of the hereinbefore alleged fraudulent acts of said Farmers State Bank and its officers and directors, and said American National Bank, and its officers and directors, or of such fraudulent acts on the part of any of such *pfficers* and directors, or of such fraudulent acts on the part of the defendants herein, or any of them, and did not know or discover the same until within approximately one year next preceding commencement of this action, and that all the matters and things herein alleged respecting the [fols. 281-283] aforementioned fraudulent conversion by the defendants, and each of them, and the aforementioned fraudulent misconduct and conversions, etc., of the officers and directors of said American National Bank, and the fraudulent misconduct, conversions, etc., of the officers and directors of said Farmers State Bank, and each of them, to perform faithfully, diligently and honestly the duties of their office as such officers and directors, and of the fraudulent conversion and misappropriation of said "Crews Estate Oil &7Gas Producers, Escrow" account, funds, money, Liberty Bonds and or Treasury Certificates, accrued, interest, proceeds thereof, etc., have been discovered by these plaintiffs within approximately one year next preceding the commencement of this action, and since October 15, 1930, and prior to such time, and up until such discovery, plaintiffs, and each of them, at all times believed that the affairs of said Banks were being honestly administered and that

the officers and directors of said Banks were faithfully, diligently and honestly performing their duties as such and that the aforesaid deposit and "Crews Estate Oil & Gas Producers, Escrow" account, funds, money, Liberty Bonds and/or Treasury Certificates accrued interest, proceeds thereof, etc., were *bing* honestly administered, preserved and safely kept, and that same was intact and that same, and every part thereof, was available for delivery upon demand could and would be delivered by said Banks upon demand.

Wherefore, plaintiffs pray judgment against the said defendants, and each of them, for the sum of Three Hundred Seventy-Seven Thousand Two Hundred and Fifty and No/100 ($377,250.00) Dollars, together with interest on the sum of $269,000.00 thereof at 6% per annum from December 1, 1931, until paid; and for costs.

Christy Russell, Attorney for Plaintiffs.

[fol. 284] PLAINTIFFS' EXHIBIT —

In the District Court of Garfield County, State of Oklahoma. Ralph Crews, Everett Crews, Robert Crews, Charley Crews, Amy Tresner, nee Crews, and Mary Willis, nee Crews, Plaintiffs, vs. American National Bank of Enid, Oklahoma, a banking corporation, Defendant. No. 13225.

Journal Entry

This cause coming on for trial this 5th day of October, 1937, plaintiffs appear in person and by attorneys, A. F. Moss, Christy Russell and M. F. Priebe, and the defendants, the American National Bank of Enid, Oklahoma, N. E. Crumpacker, C. F. Randolph and Joseph Meibergen, administrator with will annexed of the estate of W. B. Johnston, deceased, appear in person and by their attorneys, P. C. Simons, H. G. McKeever, and Roy J. Elam.

Whereupon, all parties announce ready for trial. The jury is duly empanelled to try said cause.

Whereupon, the plaintiffs upon introduction of evidence, and the taking of evidence not having been concluded the [fol. 285] court rests from day to day and over the week end of each week and resumes the trial from day to day until finally on the 22nd day of October, 1937, the plaintiffs rest.

Whereupon, the defendants, and each of them demur to the evidence of the plaintiffs, and upon consideration thereof the demurrers of the defendants, N. E. Crumpacker, C. F. Randolph and Joseph Meibergen, administrator with the will annexed of the estate of W. B. Johnston, deceased, are by the court sustained and to the action of the court in sustaining said demurrer to the evidence, introduced on the part and on behalf of the defendant, N. E. Crumpacker, the plaintiffs object and except, and which exception is by the court hereby allowed, and to the action of the court in sustaining the demurrer upon the part and behalf of the defendant, C. F. Randolph, the plaintiffs object and except, and which said exception is by the court hereby allowed, and to the action of the court in sustaining the demurrer of the defendant, Joseph Meibergen, administrator with the will annexed of the estate of W. B. Johnston, deceased, the plaintiffs object and except and which said objection is by the court hereby allowed.

It Is Hereby by the Court Ordered, Adjudged and Decreed that the action of the plaintiffs against the defendants, N. E. Crumpacker, C. F. Randolph, Joseph Meibergen, administrator with the will annexed of the estate of W. B. Johnston, deceased, is hereby by the court as to each of the last-named defendants dismissed, and to the action and the judgment of the court dismissing said action as to the said defendant, N. E. Crumpacker, and the said defendant, C. F. Randolph, and the defendant, Joseph Meibergen, as administrator with the will annexed of the estate of W. J. Johnston, deceased, the plaintiffs object and except, and which said exception of the plaintiffs are hereby by the court separately allowed.

And It Is Further Ordered that the demurrer of the defendant, the American National Bank of Enid, Oklahoma, be and the same is hereby overruled, to which action of the court in overruling said demeurrer the said defendant, American National Bank of Enid, Oklahoma, hereby objects and excepts, and which said exception is by the court hereby allowed.

[fol. 286] Whereupon, said trial is resumed and the defendant, the American National Bank of Enid, Oklahoma, begins to introduce its testimony, and said testimony not having been concluded, and the hour of adjournment having arrived said cause is recessed over the week end, and

thereafter said trial is resumed on October 26, 1937, pursuant to adjournment and trial is resumed and recessed from day to day until October 27, 1937, on which date all of the evidence having been concluded, all parties having rested. The court gives his instructions to the jury in writing at the conclusion of which said cause was duly argued by the respective parties and said cause was, on the 28th day of October, 1937, duly submitted to the jury for consideration.

And that thereafter and on October 29, 1937, the jury returned its verdict which was duly received, read, and recorded and is as follows, to-wit:

"Verdict. In the District Court in and for Garfield County, State of Oklahoma. Ralph Crews, Everett Crews, Robert Crews, Charley Crews, Amy Tresner, nee Crews, and Mary Willis, nee Crews, Plaintiffs, vs. American National Bank of Enid, Oklahoma, a banking corporation, Defendant. Case No. 13,225.

Verdict

We, the jury empaneled and sworn to try the issues in the above entitled cause, do upon our oaths, find for the plaintiffs and against the defendant American National Bank of Enid, Oklahoma, and fix and assess the amount of plaintiffs' recovery at the sum of $249,000.00.

E. W. Stuart, J. E. Davis, H. C. Metcalf, C. J. Boepple, Mortie B. Johnson, J. H. Niehaus, W. S. Blevins, Sam Roads, Sam Petty, Victor Brakhage, Frank Hall, Foreman."

To which verdict and the rendition thereof the defendant American National Bank of Enid, Oklahoma, objects and excepts, and which said exception is by the court hereby allowed.

And now on this 29th day of October, 1937 it is by the [fols. 287-416] Court Ordered, Adjudged and Decreed that the plaintiffs Ralph Crews, Everett Crews, Robert Crews, Charley Crews, Amy Tresner, nee Crews, and Mary Willis, nee Crews, do have and recover of, from and against the defendant American National Bank of Enid, Oklahoma, judgment in the sum of two hundred forty nine thousand dollars ($249,000.00) and interest thereon from this date at the rate of six per cent per annum together with the cost

of this action for all of which let execution issue to which judgment the American National Bank of Enid, Oklahoma, excepts and which said exception is by the court allowed.

O. C. Wybrant, Judge of the District Court.

Filed Nov. 10, 1937.

O. K. A. F. Moss, Christy Russell, M. F. Priebe, Attorneys for Plaintiff. P. C. Simons, Simons, McKnight, Simons, Mitchell & McKnight, H. G. McKeever, McKeever, Stewart & McKeever, Roy J. Elam, Attorneys for Defendant.

* * * * * * *

[fol. 417] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION

Second Day, May Term, Tuesday, May 23rd, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard, P. C. Simons, Esquire, and L. E. McKnight, Esquire, appearing for appellants in cases Numbers 2872 to 2876; J. B. Dudley, Esquire, appearing for appellant in case No. 2872; Harry O. Glasser, Esquire, appearing for appellants in cases Numbers 2870 and 2871; Christy Russell, Esquire, appearing for appellees.

Thereupon argument was commenced by counsel and continued to the hour of adjournment.

ORDER OF SUBMISSION

Third Day, May Term, Wednesday, May 24th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on further to be heard, P. C. Simons, Esquire, and L. E. McKnight, Esquire, appearing for appellants in cases Numbers 2872 to 2876; J. B. Dudley, Esquire, appearing for appellant in case No. 2872; Harry O. Glasser, Esquire, appearing for appellants in cases Numbers 2870 and 2871; Christy Russell, Esquire, appearing for appellees.

Thereupon argument by counsel was concluded and the causes were submitted to the court.

[fol. 418] IN UNITED STATES CIRCUIT COURT OF APPEALS

Nathan Scarritt and E. S. Champlin on brief for appellants in No. 2870.

Harry O. Glasser for appellants in Nos. 2870 and 2871.

P. C. Simons, (L. E. McKnight and J. B. Dudley (Simons, McKnight, Simons, Mitchell and McKnight were with them on the brief) for appellant in No. 2872.

P. C. Simons and L. E. McKnight (Simons, McKnight, Simons, Mitchell and McKnight were with them on the brief) for appellants in Nos. 2873 to 2876.

Christy Russell (M. F. Priebe was with him on the briefs) for appellees in Nos. 2870 to 2876, inclusive.

Before Phillips, Bratton and Huxman, Circuit Judges.

OPINION—July 6, 1944

Huxman, Circuit Judge, delivered the opinion of the court.

This litigation had its genesis in an escrow agreement executed by the appellees with the Garber Refining Company. Under this agreement the proceeds from oil production which was in litigation were placed in escrow in the Farmers State Bank of Garber, Oklahoma, to await the outcome of the litigation. At the termination of this litigation in 1930, the escrowed funds became the property of the appellees. An investigation shortly thereafter revealed that practically all of the escrowed funds had been embezzled and dissipated. The appellees also shortly thereafter ascertained that a considerable amount of these funds had found their way into the American National Bank of Enid, Oklahoma.

In the meantime, in November, 1929, the American National Bank of Enid had sold its business and transferred its assets to the First National Bank of Enid, Oklahoma. In the transaction it received $240,000 in cash from the First National Bank of Enid. On November 25, 1929, the stockholders and directors of the American National Bank [fol. 419] by appropriate proceedings went into voluntary liquidation under 12 USCA § 181. Prior thereto, all known claims had been paid and the $240,000 received from the First National Bank had been distributed to the stockholders. On January 20, 1930, a notice of intention to

liquidate was published in The Enid Events, a newspaper published in Garber County, Oklahoma. A notice was also published in the Bond News, a newspaper published in New York City, New York. The notice published in the Enid Events did not comply with 12 USCA § 182, in that it was not published for two full months. Both notices were published after the distribution of the $240,000 to the stockholders. The appellant directors had no part in or knowledge of any wrongful handling of the trust funds which found their way into the American National Bank, and at the time of the distribution of the $240,000 had no knowledge that such a claim existed or would be asserted against the bank.

On December 16, 1931, the appellees instituted an action against the American National Bank in the state courts of Oklahoma to recover judgment for the escrowed funds which had found their way into that bank. Judgment was entered against the bank October 29, 1937, for $249,000 and interest. The case was appealed to the Supreme Court of Oklahoma where the judgment was subsequently affirmed. On January 20, 1938, and while the state case was pending on appeal in the Supreme Court, this action was instituted against the stockholders and directors of the American National Bank in the District Court of the United States for the Northern District of Oklahoma.

In the first cause of action the appellees sought to establish a trust in the liquidation dividend of $240,000 paid to the stockholders, and sought to recover the same, less any amounts paid back by some of the stockholders. In a second cause of action they sought to enforce the double liability of the stockholders, and in a third cause of action they sought judgment against the members of the Board of Directors of the bank on the theory that they were trustees in the liquidation proceedings and were derelict in the discharge of their duties as such trustees in the distribution of the $240,000 to the stockholders.

[fol. 420] Judgment was entered on the first cause of action against those stockholders of whom the court had jurisdiction for the amount of the liquidation dividend they had received. On the second cause of action, judgment was entered against the stockholders for an amount sufficient to satisfy the balance of the judgment remaining unsatisfied by the judgment on the first cause of action. On the third

cause of action, judgment was rendered against the directors for $188,280, and interest. It was decreed that no execution issue on this judgment until appellees had exhausted their remedy on the judgments rendered in the first and second causes of action or had shown good cause for failure so to do. Jurisdiction was retained to control the issuance of execution on these grounds.

In some cases, judgment was entered against appellants on all three causes of action. In others, judgment was entered against them on the first and second causes, while in some, judgment was entered on the first and third causes of action, and in one instance judgment was entered on the third cause of action alone. In the main, the various appeals present questions that are common to the cause of action in which the judgment was entered. In some appeals questions were presented which do not arise in the others. The questions that are common to the judgment in which they arose will be treated without reference to any particular appeal. Specific reference to appeals will be made only in those cases in which special questions are presented.

Jurisdiction

The jurisdiction of the court to entertain the first and third causes of action is challenged by various appellants. There is no diversity of citizenship, so that federal jurisdiction must be based on other grounds. The jurisdiction of the court was invoked under that part of 28 USCA § 41 (16) which reads as follows: "* * * and cases for winding up the affairs of any such bank." Is this a proceeding to wind up the affairs of a national bank? Our conclusion is that the answer must be in the affirmative. The bank had sold its assets and had ceased functioning as a banking institution. By appropriate resolution it had voted to liquidate and had appointed a liquidating agent. An [fol. 421] attempt had been made to publish the statutory notice required in such event. In George v. Wallace, 135 F. 286, it was held that a suit against an insolvent bank which had gone into voluntary liquidation to enforce a specific lien or to enforce and judicially administer a trust previously created by contract or arising from the insolvency and liquidation proceeding was a suit arising under the laws of the United States within the jurisdiction of the

Federal Court, as prescribed by statute. In Richmond v. Irons, 121 U. S. 27, 49, the court said:

> "In the case of involuntary liquidation under the supervision of the Comptroller of the Currency, the receiver appointed by him is authorized and required, not only to collect and apply the proper assets of the bank to the payment of its debts, but also, so far as may be necessary, to enforce the individual liability of the shareholders. It thus appears that the enforcement of this liability is a part of the liquidation of the affairs of the bank; at least, so closely connected with it as to constitute but one continuous transaction. When, in the case of voluntary liquidation, the proceeding is instituted by one or more creditors for the benefit of all, by means of the jurisdiction of a court of equity, there seems to be no reason why the nature of the proceedings should be considered as changed. The intention of Congress evidently was to provide ample and effective remedies in all the specified cases for the protection of the public and the payment of creditors, by the application of the assets of the bank and the enforcement of the liability of the stockholders. Admitting that this liability is not strictly an asset of the bank, because it could not be enforced for its benefit as a corporation nor in its name, yet it is treated as a means of creating a fund to be applied with and in aid of the assets of the bank towards the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank."

[fol. 422] In Brown v. O'Keefe, 300 U. S. 598, 604, it was held that:

> "If the bank is in course of liquidation by a voluntary liquidator, the liability is enforcible by a creditor or creditors, suing for themselves and for others similarly situated."

The liability to the stockholders for the liquidation dividend they had received, their liability for assessment on

their stock, and the liability of the directors, if any, for dereliction of duty, were all liabilities primarily due to the bank for the benefit of creditors. Had a receiver been appointed to wind up the affairs of the bank, he could have enforced all three classes of rights for the benefit of the creditors of the bank. The action by the appellees was in the nature of a creditor's bill to enforce rights belonging to the corporation for the benefit of creditors. The action was a part of the process of winding up the affairs of the bank. The court had jurisdiction of all three causes of action under 28 USCA § 41 (16).

Laches

It is next urged that the first and third causes of action were barred by laches. The action against the American National Bank was instituted December 16, 1931. This action was not begun until January 20, 1938, more than six years thereafter. The applicable Oklahoma statutes of limitations provide that actions upon contracts, express or implied, not in writing, or actions upon liability created by statute other than a forfeiture or a penalty, must be begun within three years; that an action for detaining or injuring personal property, an action for injury to the rights of others, not arising on contract, an action on the ground of fraud, must be brought within two years, and that actions for relief not otherwise provided for must be brought within five years. Title 12 O. S. 1941, § 95. These provisions control if the statutes of limitations under Oklahoma law are applicable.

Appellants contend that appellees could have joined the stockholders and the directors in the original action against the bank. That, not having done so, and more than five years having elapsed before they instituted this action, it [fol. 423] is barred. We think the weight of authority is contrary to this contention. The general rule is that where a claim is for unliquidated damages or for a simple contract debt, a creditor may not maintain a creditor's bill in equity until he has reduced his claim to judgment in a court of law. The facts in Swan Land & Cattle Co. v. Frank, 148 U. S. 603, are very similar to the facts in this case. The corporation there had distributed all its assets to its stockholders and had ceased doing business. The Supreme Court held that a creditor who had an unliquidated claim

against the corporation could not maintain an action in the nature of a creditor's bill against the stockholders who had received the assets to subject them to the satisfaction of their claim, without first having reduced the claim against the corporation to judgment. The court said:

> "We are also clearly of opinion that the court below was correct in sustaining the demurrer to the bill upon the other ground assigned, that the complainant had not previously reduced its demand against the vendor corporations to judgment. That claim was purely legal, involving a trial at law before a jury. Until reduced to judgment at law, it could not be made the basis of relief in equity."

See, also, Hollis v. Brierfield Coal & Iron Co., 150 U. S. 371.[1]

But even if it be conceded that appellees could have joined appellants in the original action against the American National Bank, they may nevertheless not prevail on this point. The disposition of this question is not controlled by the statute of limitations of Oklahoma. It must be decided upon the principle of laches. A court of equity is not bound by the statute of limitations, although it will ordinarily give effect thereto in many situations by analogy to the statute of limitations.[2]

[fol. 424] Laches has been defined as being inexcusable delay in asserting a right; an unexcused delay in asserting rights during a period of time in which adverse rights have been acquired under circumstances that make it inequitable to displace such adverse rights for the benefit of those who are bound by the delay. It has been said that laches differs from limitations in that limitations are concerned with the

---

[1] Oklahoma adheres to this rule. See Porter v. Rott, 243 P. 160; Chandler v. Colcord, 32 P. 330; Miller v. Melone, 67 P. 479; Indian Land & Trust Co. v. Owen, 162 P. 818.

[2] 19 Am. Jur., Equity, §§ 496, 497;
Winget v. Rockwood, 69 F. 2d 326;
City of Roswell v. Mountain States Tel. & Tel. Co., 78 F. 2d 379;
West v. American Tel. & Tel. Co., 108 F. 2d 347;
30 C. J. S., Equity, § 116.

fact of delay, while laches concerns itself with the effect of delay.[3]

No absolute rule can be laid down by which to determine what constitutes laches or staleness of demand. Each case must be determined according to its own peculiar circumstances. Since laches is an equitable doctrine, its application is controlled by equitable considerations. It cannot be invoked to defeat justice and will be applied as a defense only where the enforcement of the asserted right would work injustice.[4]

It has been held that equity will not consider as laches delay due to a bona fide effort to assert a right at law, the failure of which really established the right to go into equity;[5] that delay pending other proceedings is excusable not only where the termination of such proceedings was necessary for the ascertainment of facts or the establishment of rights or liabilities involved in the latter suit, but also where the former suit had a similar object but proved unavailing; delay has been excused where plaintiff had lost time by proceeding first against another person whom he [fol. 425] expected to be primarily liable.[6] The Supreme Court has held that the fact that the decree can do no harm to any innocent person does away with the defense of laches.[7]

These equitable considerations are especially applicable to this case. Appellants were only secondarily liable. Their duty to respond depended upon the ability of appellees to obtain a money judgment against the American National

---

[3] 30 C. J. S., Equity, § 112;
19 Am. Jur., Equity, §§ 439, 508;
D. O. Haynes & Co. v. Druggists' Circ., 32 F. 2d 215.

[4] City of Roswell v. Mountain States Tel. & Tel. Co., 78 F. 2d 379;
30 C. J. S., Equity, §§ 115, 116, 120;
19 Am. Jur., Equity, §§ 499, 509;
Townsend v. Vanderwerker, 160 U. S. 171, 186;
No. Pac. Ry. v. Boyd, 228 U. S. 482.

[5] Nuveen v. Bd. of Public Instruction, 88 F. 2d 175.

[6] 30 C. J. S., Equity, §§ 125, 228; No. Pac. Ry. v. Boyd, 228 U. S. 482; Nuveen v. Bd. of Public Instruction, 88 F. 2d 175.

[7] McIntire v. Pryor, 173 U. S. 38.

Bank. Appellees' claim was an unliquidated demand founded in a tort of a very controversial nature, as is evidenced by the fact that the judgment was sustained by the Supreme Court by a bare majority. Had they joined appellants in the original action, they no doubt would have been promptly met by a demand that the proceedings against them be stayed until the primary liability of the bank was determined. That this would have resulted is evidenced by the fact that when they instituted this action against appellants immediately after they had obtained their judgment in the District Court, appellants promptly moved for and obtained a stay of this case from the trial court until the litigation in the Supreme Court was finally determined. How, then, can it be said in all fairness that they are injured in any wise by appellees' failure to institute this action against them on their secondary liability until appellees at least had a money judgment in the state court? Under these facts, it would not only not be inequitable to refuse to apply the doctrine of laches, but it would be most inequitable to do so.

Unclean Hands

It is urged that the appellees were not entitled to prevail because they came into a court of equity with unclean hands. This assertion is based on the following facts: The appellees were challenging the validity of an oil and gas lease given to the Sinclair Oil and Gas Company. They were in possession of the land and were developing it for oil and gas. While the litigation was pending, they sold [fol. 426] the oil to the Garber Refining Company under an agreement that the proceeds, less their one-eighth royalty, were to be escrowed in the Farmers State Bank of Garber to be preserved under the terms of the escrow agreement, which are not material here, and were to be delivered to them by the escrow holders if and when the litigation finally adjudicated their rights to the lease, or a settlement favorable to them was made outside of court. It appears that while these funds were escrowed with the Garber bank, the appllees obtained a release to them of some $40,000 of the funds. It is charged that this was a violation of the rights of the Garber Refining Company and that as the appellees themselves were guilty of a wrongful manipulation of these funds, they may not now urge the wrong of the Garber

and Enid banks as a ground for recovery of funds that were theirs. It is not required that one who comes into a court of equity must come with spotless hands. It is not every stain that will bar the right of a petitioner to relief. The application of the maxim is based upon conscience and good faith, and is confined to misconduct in relation to the matter in litigation, so that in some manner it affects the equitable relation of the parties to the suit.[8] Aside from other considerations, the transaction which is urged as a stain on the hands of the appellees herein bears no relation whatever to the transaction out of which the liability to the American National Bank arose.

Personal Liability of the Directors

The trial court correctly held that the directors were charged with the supervision of liquidation under 12 USCA § 181, and that in the discharge of such duties they acted in a fiduciary capacity.[9] It follows that they would be chargeable with any loss resulting from their failure to discharge their functions in a manner required by such a relationship. What, then, is the duty of a director toward the bank while it is a going concern, and toward its creditors when it is in liquidation? The relationship in either event is the same, for in each case a director is a fiduciary or a [fol. 427] trustee. Officers and directors of banks are fiduciaries and at common law the liability for their acts is such as stems from such a relationship.[10] The duty resting upon directors has been variously defined as requiring such care and diligence as an ordinarily prudent man would exercise with reference to the administration and management of such a moneyed institution.[11] It has been said that

---

[8] See Ohio Oil Co. v. Sharp, (10 Cir.) 135 F. 2d 303, and cases cited therein.

[9] Briggs v. Spaulding, 141 U. S. 132; Williams v. Fidelity Loan & Savings Co., 128 S. E. 615; First State Bk. v. Met. Cas. Ins. Co., 79 S. W. 2d 835.

[10] 7 Am. Jur., Banks, §§ 286, 291, 825; Briggs v. Spaulding, 141 U. S. 132; Williams v. Fidelity Loan Co., 128 S. E. 615; First State Bk. v. Met. Cas. Ins. Co., 79 S. W. 2d 835; Bowerman v. Hamner, 250 U. S. 504.

[11] 7 Am. Jur., Banks, § 286.

they owe a high degree of duty to the general public and stockholders. [12]

National bank directors are subject to both a statutory liability and a common law liability in the discharge of the duties of their office. [13] 12 USCA § 182 makes it the duty of the board of directors to certify to the Comptroller of the Currency a notice of their intention to liquidate and to publish a notice for a period of two months in a newspaper published in the City of New York and also in a newspaper published in the city or town in which the bank is located. This notice is for the benefit of creditors and of necessity must be published before the funds of the institution are distributed. Admittedly this statutory requirement was not complied with prior to the distribution of the $240,000 to the stockholders.

Title 12, USCA §93 provides that any director who shall knowingly violate any of the provisions of the chapter, which includes the provision for the publication of the notice, shall be personally liable for all damage sustained in consequence of such violation.

It has been held that before a director becomes personally liable for the violation of a statutory duty, it must be [fol. 428] established that he intentionally violated the statory requirement. Establishment of mere negligence is not sufficient. [14] We think there is a clear absence of any showing that the directors acted wilfully or intentionally in their failure to publish this notice prior to the disbursement of these funds. The court found that they acted in good faith; none of the appellants contend that they acted in bad faith; nor is there any reason why they should have wilfully or intentionally refused to publish the required notice. None of the appellant directors knew or had reason to believe that there was any claim outstanding against the bank.

But although the directors may not be liable for violation

---

[12] First State Bk. v. Met. Cas. Ins. Co., 79 S. W. 2d 835; Seale v. Baker, 7 S. W. 742, 744; Briggs v. Spaulding, 141 U. S. 132; 7 C. J., § 169, p. 563.

[13] Bowerman v. Hamner, 250 U. S. 504, 510.

[14] Yates v. Jones Natl. Bank, 206 U. S. 158; Payne v. Ostrus, 50 F. 2d 1039; Bowerman v. Hamner, 250 U. S. 504.

of their statutory duty to publish this notice prior to the distribution of these funds, they may nevertheless be liable if they violated their common law duty as directors in the liquidation of the bank. As pointed out above, at common law directors must exercise such care as ordinarily prudent men would exercise in the administration and management of such an institution, and they will be held to a high degree of care, both to the stockholders, and the general public. But a director is not an insurer and is not absolutely liable for loss resulting from his inattention. He is liable only for loss that results from his negligence. [15]

Every known claim had been paid and satisfied. No one connected with the liquidation of the bank had any reason to believe that there existed any possible claim against these funds. Under these circumstances we do not believe it can be said that there was a violation of their common law duty to exercise reasonable care in paying this money to the stockholders.

But even if it be said that they were negligent in the disbursement of this money, still they are not personally liable. They are liable only for such loss as proximately results from their negligence. [16] The mere fact that the di- [fol. 429] rectors do not know of the existence of a claim does not relieve them from failure to publish the notice. One purpose of the notice is to permit those who have claims of which the bank has no knowledge to present them and call them to the attention of the officers. But here the appellees themselves did not know at that time that they had a claim against the American National Bank. They did not know it for considerably more than a year after the bank ceased doing business and went into liquidation. It must then be conceded that had this notice been published, this claim would not and could not have been presented. It follows that the failure of the appellees to reach this fund of $240,000 in the hands of the liquidating agent was not the proximate result of any claimed negligence on the part of the directors. Nothing that could have been done in the course of an orderly, timely liquidation would have made the fund available for the satisfaction of a claim the exist-

[15] Wallach v. Billings, 115 N. E. 382; Warner v. Penoyer, 91 F. 587.

[16] Wallach v. Billings, 115 N. E. 382; 7 Am. Jur., Banks, §§ 294, 298; Briggs v. Spaulding, 141 U. S. 132.

ence of which was unknown to any of the parties to this litigation for more than a year after the liquidation was undertaken.

Liability Not Within 12 U. S. C. A. §§ 63, 64

It is contended that the transaction out of which appellees' judgment arose did not constitute a "contract, debt or engagement," as those terms are used in 12 U. S. C. A. §§ 63, 64, for which stockholders become liable for assessment upon their stock. Authorities are cited in support of the contention that a judgment against a bank based on tort is not a contract, debt, or engagement of the bank within the meaning of similar statutory provisions. We deem it unnecessary to discuss these decisions, because we believe that as far as the national bank act is concerned, the question is settled by the decision of the Supreme Court in Oppenheimer v. Harriman Bank, 301 U. S. 206. In that case the Supreme Court interpreted these very terms of the statute. The judgment there also sounded in tort. Involved was the right of the holders of such a judgment to have it satisfied out of assessments on stockholders' liability. The court pointed out that the statute should be reasonably construed in favor of claimants. Speaking of the terms "contracts," "debts," and "engagements," the court said:

> "They are broad enough to include all pecuniary [fol. 430] liabilities and obligations of the bank. Indeed, that is a well-recognized meaning of the word 'engagement.' Plaintiff's claim is for the money the bank fraudulently got from him and used in its business. Clearly that liability is covered by the phrase 'contracts, debts and engagements.'" (Page 213).

The construction for which appellants contend cannot be sustained.

Insolvency of the Bank

The American National Bank closed its doors as a banking institution on the evening of November 25, 1929. Thereafter it did no banking business. The $240,000 involved in this suit was distributed to the stockholders in December, 1929. After its distribution, the only asset the bank had was the right to receive an additional $100,000 from the First National Bank of Enid when the paper which it had guaranteed was paid, but its total liability on its guarantee

of paper amounted to $138,591.48. In addition, it had outstanding appellees' claim of $249,000.

A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A. § 21 et seq., when it is unable to meet its obligations when they mature.[17] While appellees' claim was contingent and unknown at the time the bank closed its doors, it must be considered in determining the solvency of the bank.[18] It is quite obvious that the American National Bank was wholly unable at any time after it closed its doors on the evening of November 25, 1929, to meet its obligations and that its insolvency dates from that time. All stockholders, including appellant M. C. Garber, in No. 2783, who transferred their stock within sixty days prior to November 26, 1929, were liable for the stock assessments even though the transfers were made in good faith.

[fol. 421] *Appeal No. 2874.*

Liability of Heirs and Distributees of Estates of Deceased Stockholders.

C. E. Gannon, a stockholder, held 130 shares of stock on November 26, 1929. He died December 4, 1934. His estate was probated and notice to creditors to present their claims was published June 18, 1935. Appellees did not file their claim against his estate. On February 29, 1936, a final decree of distribution was entered distributing the entire estate to his wife, Kate Gannon, and his two daughters, Florence Lovell and Ruth Munger. The distribution of this estate was prior to the date on which appellees obtained their judgment against the bank in the state district court. Kate Gannon died May 24, 1941, and her estate descended to her two daughters, Florence Lovell and Ruth Munger. Appellees failed to file their claim against the estate of Kate Gannon, and have abandoned their claim against her estate.

---

[17] Smith v. Witherow, 102 F. 2d 638;
Aycock v. Bradley, 77 F. 2d 14;
Kullman & Co. v. Woolley, 83 F. 2d 129.

[18] Scott v. Commissioner, 117 F. 2d 36.

Oklahoma adheres to the Minnesota rule,[19] which permits action by a creditor of a decedent against heirs, devisees or legatees of the estate who have received assets of the estate, to the extent of the value thereof.[20] Appellants contend, however, that appellees' claim is barred for failure to comply with 58 O. S. A. § 333. The first part of this section provides that all contracts heretofore made are forever barred if not presented against the estate within the time fixed in the notice for the presentation of claims. This portion of the statute provides that claims that are contingent or not due may be presented within one month after they become absolute. The latter part of the section deals with contracts thereafter made and provides that as to such contracts all claims, thereunder, whether due, not due, or contingent, must be presented within the time fixed in the notice or they are barred. We have held that the American National Bank was insolvent after November 26, 1929. It must follow that appellees had a contingent claim against stockholder C. E. Gannon at least from the time they instituted their suit against the bank. Appellants in [fols. 432-442] their appeal largely rely upon two decisions by the Supreme Court of Oklahoma to sustain their position, Fluke v. Douglas, 13 P. 2d 210, and Timmons v. Hanna Const. Co., 55 P. 2d 110. Both of these cases involved express contracts. Here the liability arose by operation of law and creates a relationship in the nature of an implied contract. No decision by the Supreme Court of Oklahoma is cited dealing with obligations or implied contracts arising by operation of law. A reasonable interpretation of the statutory provision would seem to indicate that it applies only to express contracts. In the absence of any aid from the Oklahoma Supreme Court, we so interpret the section.

Furthermore, there is no showing in the record when this stock was purchased. No finding was requested and none was made. In this condition of the record, we cannot say that the decision of the trial court in this respect is erroneous.

That part of the judgment against D. J. Oven, N. E. Crumpacker, C. F. Randolph and R. L. Sanford for $188,280

---

[19] See Matteson v. Dent, 176 U. S. 521, for a discussion of the Minnesota rule.

[20] Chitty v. Gillett (Okla.), 148 P. 1048.

and interest, as directors, is Reversed, and the actions are Remanded with directions to dismiss the third cause of action against the directors with prejudice. In all other respects, the judgment is Affirmed. The costs of the appeal are equally divided between appellants and appellees.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT

Twenty-fifth Day, May Term, Thursday, July 6th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that that part of the judgment of the said district court against D. J. Oven, N. E. Crumpacker, C. F. Randolph and R. L. Sanford for $188,280.00 and interest, as directors, is reversed, and in all other respects the said judgment is affirmed; that the actions are remanded with directions to dismiss the third cause of action against the directors with prejudice; and that the costs of the appeals are equally divided between appellants and appellees.

[fol. 443] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

No. 2873

M. C. GARBER, Appellant,

vs.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, Amy Tresner, nee Crews, and Mary Willis, nee Crews, Appellees.

PETITION FOR REHEARING—Filed July 22, 1944

The Appellant, M. C. Garber, respectfully requests the court to grant him a rehearing in this cause and earnestly requests this court to reconsider the decision handed down

by it as to this appellant, and, as grounds therefor, contends that in the opinion handed down by this court that the interpretation placed by this court upon the Federal statute imposing liability upon stockholders in a national bank who shall have transferred their shares or registered the transfer thereof within sixty days next before the failure of such association to meet its obligations is erroneous. [fol. 444] In the opinion of the court, under the sub-title "Insolvency of the Bank," this court says as follows:

"Insolvency of the Bank"

"The American National Bank closed its doors as a banking institution on the evening of November 25, 1929. Thereafter it did no banking business. The $240,000 involved in this suit was distributed to the stockholders in December, 1929. After its distribution, the only asset the bank had was the right to receive an additional $100,000 from the First National Bank of Enid when the paper which it had guaranteed was paid, but its total liability on its guarantee of paper amounted to $138,591.48. In addition, it had outstanding appellees' claim of $249,000.

"A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Sec. 21 *et seq.*, when it is unable to meet its obligations when they mature. While appellees' claim was contingent and unknown at the time the bank closed its doors, it must be considered in determining the solvency of the bank. It is quite obvious that the American National Bank was wholly unable at any time after it closed its doors on the evening of November 25, 1929, to meet its obligations and that its insolvency dates from that time. All stockholders, including appellant M. C. Garber, in No. 2783, who transferred their stock within sixty days prior to November 26, 1929, were liable for the stock assessments even though the transfers were made in good faith."

It is apparent from the above excerpt from the opinion that this court proceeds upon the theory that notwithstand- [fol. 445] ing the fact that when the American National Bank ceased to do business as a bank on November 25, 1929, by reason of having sold its business and assets to

the First National Bank, that provision had been made for the payment of all of its known obligations and that the claim of the plaintiffs had not been asserted at that time and was not even known to them for more than a year thereafter and was not known to the bank, that when the claim of the plaintiffs was asserted by the filing of their suit against the bank, and thereafter a judgment was obtained by them against the bank in 1937, that this judgment was retroactive and related back to the date of the sale of the assets of the bank on November 25, 1929, thereby establishing the fact that it was insolvent at that date and holds that M. C. Garber, having sold his stock to D. J. Oven within sixty days prior to such date of November 25, 1929, that he thereby was brought within the scope of the sixty day provision imposing a double liability upon the stockholders who had sold their stock within sixty days before the date of the failure of a bank to meet its obligations.

This interpretation of the statute is, in our opinion, entirely erroneous.

In the above extract from the opinion, this court says:

> "It is quite obvious that the American National Bank was wholly unable at any time after it closed its doors on the evening of November 25, 1929, to meet its obligations and that its insolvency dates from that date."

[fol. 446] We submit that the above is not the criterion from which to determine the liability of this appellant.

The language of the statute does not provide that a stockholder shall be liable who transfers his stock within sixty days before the date of the insolvency of the bank or the inability of the bank to meet its obligations, but fixes the time as being sixty days next before the *failure* of such association to *meet its obligations* and unless the American National Bank failed to meet or pay its obligations within sixty days subsequent to the sale and transfer of his stock by M. C. Garber, then he is not liable under the provisions of this statute.

We submit that this court has fallen into an error in substituting the date of the sale of its business by the American National Bank to-wit: November 25, 1929, as the date following which the American National Bank failed to meet its obligations.

We submit that the question of the insolvency of the American National Bank on November 25, 1929, either as it existed at that time or as thereafter determined by making the judgment obtained by the Crews heirs in 1937 retroactive and carrying it back to that date is entirely immaterial and beside the question unless on November 25, 1929, or within sixty days following November 14, 1929, the date when M. C. Garber sold and transferred his stock in the bank to D. J. Oven, the bank failed to meet its obligations and unless the bank, within such period of time, failed to meet some obligations either presented to it during the period from November 14 to November 25, or pre-
[fol. 447] sented to its officers or liquidating agent subsequent to November 25, 1929, and within sixty days subsequent to November 14, 1929.

The word, insolvency, is not found in Par. 64, Title 12, U. S. C. A.; neither is it found by implication therein, the plain language of the statute being that:

> "Who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to *meet its obligations* or with knowledge of such impending failure, etc."

This court has substituted "insolvency" for "failure to meet its obligations" except that this court has said that it was wholly unable, after it closed its doors on the evening of November 25, 1929, to meet its obligations, and that its insolvency dates from that date.

We again submit that the question is not whether it was *able* to meet its obligations but whether or not it *failed* to meet its obligations within sixty days subsequent to November 14, 1929, and that it could not fail to meet an obligation of which it knew nothing and of which the Crews heirs knew nothing for more than a year thereafter.

We submit that this court is reading into the statute language which is not there and an interpretation which is not there and which, if we are correct, of course, is erroneous.

Again we submit that even if the question of insolvency on November 25, 1929, were the test, but which we submit it is not, that the test of insolvency as applied by this court [fol. 448] conflicts with the definition of insolvency under

the National Banking Act as laid down by the Supreme Court of the United States in the case of *Earle* v. *Carson*, 187 U. S. 42, 47 L. Ed. 373, and as re-affirmed by that court in subsequent decisions and as held by other federal courts. In that case the Supreme Court used the following language:

> "The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it develops that the bank was insolvent at the time of transfer in the sense that its assets were then unequal to the discharge of its liabilities when such fact was unknown to the seller of the stock at the time of the sale. * * *
>
> "The error of the argument arises from the fact that it affixes to the word 'insolvency' as found in the sentences quoted, the erroneous import hitherto pointed out; that is, an inadequacy of the assets of a bank to pay its liabilities, *instead of giving to it its true meaning, that of failure and consequent suspension of business*" (Emphasis ours).

The above case is so important that we request the court to read the opinion in full.

It is referred to and reaffirmed in the case of *McDonald, Receiver*, v. *Dewey et al.*, 202 U. S. 510, 50 L. Ed. 1128.

In the case of *Brunswick Terminal Company* v. *National Bank*, 192 U. S. 386, 48 L. Ed. 491, the court laid down the following rule in the opinion by Chief Justice Fuller:

> [fol. 449] "This additional liability of a stockholder depends on the terms of the statute creating it and as it is in derogation of the common law, the statute cannot be extended beyond the words used."

In our brief on behalf of this appellant and among other authorities cited, we quoted from the case of *Brown* v. *Rosenbaum*, (Court of Appeals of New York) 287 N. Y. 510, 41 N. E. 77. Certiorari denied by the United States Supreme Court May 25, 1942; 62 S. Ct. 1282, 86 L. Ed. 1760, and which case interpreted the meaning of the language of Section 64 as to what is meant by the words, "failure of such association to meet its obligations or with knowl-

edge of such impending failure," and the opinion in which case sustains completely the contention made by us with regard to the interpretation to be placed upon this statute. We know, of course, that the decision of a state court is not binding upon this court, but in the absence of a controlling federal decision, certainly the opinion of such a court is persuasive and particularly when it is in consonance with the federal decisions upon the subject. We have quoted liberally from the opinion in that case in the brief of this appellant commencing on page 25 of our brief and a brief extract therefrom is as follows:

> "Congress has not, however, provided that the liability of stockholders, like the rights of creditors against an insolvent bank, attaches at the date of an 'act of insolvency.' Congress has expressly provided that liability of stockholders of an insolvent banking association attaches and becomes fixed upon 'the date of the failure of such association to meet its obligations.' The time when it appears that insolvency [fol. 450] makes it impossible for a bank to meet all of its obligations as they mature has been chosen by Congress as the appropriate date on which the rights of *creditors* against the bank attach; the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of *stockholders* of the bank attaches. Often, perhaps usually, the dates will coincide—not always" (Emphasis ours).

We submit that the above is an exactly correct interpretation of the federal statute. There was no failure on the part of the American National Bank to meet its obligations as they became due within sixty days following November 14, 1929, the date when the appellant, M. C. Garber, sold his stock to D. J. Oven. The claim of the plaintiffs not only was unknown to them for more than a year after such date and was not asserted by them by the filing of suit until more than two years thereafter, but it did not mature and become an enforcible claim against the bank until reduced to judgment in 1937.

We respectfully request this court to re-read that part of our brief on behalf of appellant dealing with this question, commencing on page 16 and ending on page 28. We

make this contention because we earnestly and sincerely believe that we are right and that this court has reached an erroneous conclusion upon this proposition with regard to this appellant. If we are correct in our interpretation of this statute and its application to this appellant, M. C. Garber, then regardless of the other propositions presented in our brief in his behalf, it disposes of the case against him and there can be no liability asserted against him.

[fol. 451] This court will bear in mind that it was stipulated as an agreed fact in this case (see transcript page 113):

> "That on November 14, 1929, and up to November 25, 1929, the date the American National Bank of Enid sold its business and assets to the First National Bank of Enid, the American National Bank of Enid was a solvent and going concern, not taking into consideration and excluding the claim of the plaintiffs in this case."

In the Findings of Fact by the trial court (see record page 134) the lower court found that until November 25, 1929, the bank was a going concern and believed by all of the defendants defending the case to be a solvent, as well as a going concern, and that there were no other creditors of the bank than the plaintiffs in this case.

Thus, it is an admitted fact in this case that except for the claim of the plaintiffs, the bank was a solvent and going concern and that there are no other creditors of the bank than the plaintiffs and this claim was not asserted by the plaintiffs until more than two years after the bank sold out its business and after the defendant, M. C. Garber, sold his stock to D. J. Oven, and his good faith in the transaction is unquestioned and the American National Bank did not fail to meet its obligations until it failed to pay the judgment recovered by the plaintiffs against it which was recovered in October, 1937, and we cannot comprehend how it can possibly be held that the defendant, M. C. Garber, is liable to assessment on the stock sold by him upon the theory that the bank failed to meet its obligations within sixty days after he sold his stock.

[fol. 452] In support of the conclusions reached by the court as to this appellant, four authorities are cited in the

footnote of the opinion on page 16, the first of which is *Smith* v. *Witherow*, 102 F. 2d 638. In our opinion this case supports our contention rather than the conclusion reached by this court. In the second headnote and in the body of the opinion, the court in that case lays down the rule that:

> "A national bank is 'insolvent' within the meaning of the National Banking Act when it is unable to meet its obligations as they mature, and its status is determined by the closing of its doors rather than by the theoretical state of its balance sheet, etc."

We call the attention of this court to the language of this decision: "unable to meet its obligations as they mature," and which could not support the conclusion that the American National Bank failed to meet its obligations within sixty days after November 14, 1929, for it did not fail to meet any obligation which had matured within that time.

Neither did it close its doors within the meaning of the language of that decision because such meaning is a closing of the doors of the bank by reason of its inability to meet its obligations as they mature.

In this case, the American National Bank did not sell its assets and go out of business by reason of its inability to meet its obligations as they matured, but on the contrary had paid and made provision for the payment of every known obligation and there were no other creditors of the bank, save and except the unknown claim of these plaintiffs which was not asserted by them for more than two years thereafter.

[fol. 453] It is an established fact that there was no other creditor than these plaintiffs and their claim being unknown, the sale of the assets of the bank was not made by reason of any inability to pay their claim and there was no other creditor.

The next authority cited is the case of *Aycock* v. *Bradley*, 77 F. 2d 14. Again we say that this authority, which is a decision by this court, not only fails to sustain the conclusions reached in the opinion as to this appellant, but on the contrary it supports our contentions in his behalf.

In the second paragraph of the headnotes and in the opinion written by Judge Bratton, we find the following rule laid down:

> "Insolvency of a bank within the meaning of the statute is inability to meet its obligations as they accrue in the ordinary course of business."

The next authority cited is the case of *Kullman and Co.* v. *Woolley*, 83 F. 2d 129. In the first headnote, we find the following:

> "'Insolvency' within statute invalidating preferential payments by insolvent national bank means commercial insolvency or inability of business man to pay his debts in ordinary course."

In the body of the opinion, we find the following:

> "An act of insolvency takes place when this state of affairs is demonstrated and the merchant has *actually failed* to meet some of his obligations."

The last case cited is that of *Scott* v. *Commissioner*, 117 F. 2d 36. That case did not involve the banking stat- [fol. 454] utes but involved the question of determination of the solvency of a corporation where a distribution of its assets was made among its stockholders and in the course of the opinion as well as in the headnotes, it said:

> "In determining the question of insolvency, a liability for taxes, though unknown at the time, must be considered."

That case cites in support of the rule announced, the case of *Commissioner of Internal Revenue* v. *Keller*, 59 F. 2d 499. This again involves the question of the distribution of the assets of a corporation other than a bank, and neither the case cited by this court nor the one last above referred to, have any application to the situation presented in this case. The question of including among the liabilities of a private corporation the taxes assessed against the corporation, according to the provisions of existing law, is an entirely different proposition from that here involved.

We ask the court to bear with us in our insistence upon the correctness of our contentions in this matter, for we

believe that they are sound, and that the court has made an error in holding the appellant, M. C. Garber, liable under the facts in this case, and we respectfully and earnestly ask the court to grant us a rehearing as to the appellant, M. C. Garber, on his appeal.

All of which is respectfully submitted.

P. C. Simons, L. E. McKnight, Simons, McKnight, Simons, Mitchell & McKnight, Attorneys for Appellant, M. C. Garber.

[fol. 455] In United States Circuit Court of Appeals

Opinion on Petition for Rehearing, Case No. 2873

August 26, 1944

Before Phillips, Bratton and Huxman, Circuit Judges.

Huxman, *Circuit Judge*, delivered the opinion of the court.

M. C. Garber, appellant in Number 2873, has filed a petition for rehearing in which he contends that we misinterpreted 12 U. S. C. A. § 21 et seq., as it affects the liability of one who transfers stock in a banking institution. It is contended that we established the date on which it was determined that the bank was insolvent in the sense that its liabilities exceeded its assets rather than the date on which the bank failed to meet its obligations when they matured as the date which determines the liability of one transferring stock. With this we cannot agree. We agree that it is the date on which a bank fails to meet its obligations that determines the liability of one transferring his stock. It is true that the word "insolvency" is not used in the applicable statute. The opinion could well have omitted the use of the word "insolvency." However, there can be no question as to the sense in which we used the term. We defined insolvency for the purpose of determining the liability of one transferring stock as being the failure of a bank to meet its obligations when they mature. We said: "A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A. § 21 et seq., when it is unable to meet its obligations when they mature." Inability to meet its obligations is the test which establishes the liability of one

transferring stock. We do not understand the law to require that a claim be actually presented for payment and that payment be refused before liability attaches. We know of no case holding to that effect. Certainly the case of Brown v. Rosenbaum, 41 N. E. 2d 77, upon which appellant relies, does not so hold. It holds that where a bank is closed and a conservator is appointed, the day on which the bank was closed may determine both the date on which the rights of creditors and the liabilities of stockholders attach. In People v. Merchants' Trust Co., 79 N. E. 1004, it was held that the appointment of a temporary receiver and the taking of assets by him operated to prevent the defendant from paying the claims of creditors and therefore obviated the [fols. 456-465] necessity of a formal demand for payment. In Broderick v. Aaron (N. Y.), 197 N. E. 274, 103 A. L. R. 684, the superintendent of banks took possession of a bank on December 11, 1930. It did not appear that on that date the bank was actually insolvent. The court held that "none the less the closing of the bank occasioned an automatic default in the payment of its debts and liabilities."

Garber sold his stock November 14, 1929. The bank disposed of its business and closed its doors November 25, 1929, and did not function as a banking institution thereafter. It went into voluntary liquidation and appointed a liquidating agent December 20, 1929. The directors distributed the $240,000 received from the First National Bank of Enid some time in December, 1929, to the stockholders of record as of November 25. Thereafter the bank had not a single dollar with which to meet any claim. Its doors were closed and it had ceased to function as a banking institution. The presentation of a claim for payment after that would have been a mere formality. By this course of conduct the bank automatically disqualified itself from meeting any of its obligations. To hold that it was still necessary that a claim be presented and dishonored before a stockholder's liability attached would be adopting a strained construction, entirely out of line with the purpose sought to be accomplished by the statute.

The petition for rehearing is Denied.

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing, Case No. 2873

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein.

On consideration whereof, it is now here ordered that the said petition be and the same is hereby denied.

[fol. 466] In United States Circuit Court of Appeals

Order Staying Mandates, Cases Nos. 2873 and 2874

Second Day, September Term, Wednesday, September 6th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

[fols. 467-468] These causes came on to be heard on the motions of appellants for a stay of the mandates herein and were submitted to the court.

On consideration whereof, it is now here ordered by the court that said motions be and the same are hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 469] Supreme Court of the United States

Order Allowing Certiorari—Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, limited to the first question presented by the peti-

tion for the writ and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 470] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed November 24, 1944

It Is Hereby Stipulated and Agreed by and between the petitioner and respondents, above named, that so much and such parts of the transcript of the record sent to this court from the United States Circuit Court of Appeals, Tenth Circuit in the above entitled cause as are set forth and described in the Direction to the Clerk of this Court for Printing of the Record, a copy of which Direction is hereto attached, shall be the parts of such record which shall be printed and constitute the record for submission of this cause to the court.

Dated this 21st day of November, 1944.

P. C. Simons, Attorneys for Petitioner. Christy Russell, M. F. Priebe, Attorneys for Respondents.

[fol. 471] DIRECTION TO CLERK FOR PRINTING OF RECORD

To the Clerk of Said Court:

You are requested to prepare and have printed that part of the Transcript of the Record, sent to the above named court from the United States Circuit Court of Appeals, Tenth Circuit, in said cause, as follows, to-wit:

1. The Bill of Complaint and Exhibit "A" attached thereto found on pages 1 to 19 inclusive of the Transcript.

2. Separate answer of defendant, M. C. Garber, found on pages 51 to 60 inclusive of the Transcript.

3. Statement of Matters Stipulated found on pages 105 to 118 inclusive of the Transcript.

4. Findings of Fact and Conclusions of Law of the trial court found on pages 123 to 150 inclusive of the transcript.

[fol. 472] 5. The first paragraph on page 151 of the Tran-

script entitled: "The following proceedings before the Hon. Bower Broaddus, United States District Judge."

6. The judgment of the trial court found on pages 151 to 168 inclusive of the Transcript.

7. Plaintiffs' Exhibit 1, being the agreement between the American National Bank of Enid and the First National Bank of Enid found on pages 211 to 216, inclusive, of the Transcript.

8. Plaintiffs' Exhibit "8" being Minutes of the Board of Directors of the American National Bank of Enid, Oklahoma, November 25, 1929, commencing at the bottom of page 226 and ending on page 230, inclusive, of the Transcript.

9. Minutes of Meeting of the Stockholders of American National Bank, Enid, Oklahoma, of December 20, 1929, commencing on page 230 and ending on page 232, inclusive, of the Transcript.

10. Minutes of Meeting of the Board of Directors of the American National Bank of December 20, 1929, found on pages 233 to page 235, inclusive, of the Transcript.

11. Defendants' Exhibit 1 found on pages 235 and 236 of the Transcript.

12. That part of Plaintiffs' Exhibit 116 commencing at page 236 of the Transcript, consisting of the title of the action, the words "Amended Petition," and the first paragraph following said words.

13. That part of Plaintiffs' Exhibit 116 consisting of paragraph 14 commencing on page 280 and including all thereof to the end on page 281 of the Transcript.

14. Plaintiffs' Exhibit —, being a Journal Entry commencing on page 284 and ending on page 287 inclusive of the Transcript.

[fol. 473] 15. All of the proceedings had in case No. 2873, M. C. Garber, appellant, vs. Ralph Crews, et al., appellees, in the United States Circuit Court of Appeals, Tenth Circuit, commencing with page 416 to and including page 468 of the Transcript.

P. C. Simons, Attorneys for Petitioner.

[fols. 474-478] Acceptance of Service of Direction to Clerk for Printing of Record

We the undersigned attorneys of record for the within named respondents, do hereby acknowledge receipt of a copy of the foregoing Direction to Clerk for Printing of Record in said cause and accept service thereof this 18th day of November, 1944.

Christy Russell, M. F. Priebe, Attorneys for Respondents.

[fol. 478a] [File endorsement omitted.]

[fol. 479] Endorsed on Cover: File No. 48,971, 48,972, 48,994 U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 518. M. C. Garber, Petitioner, vs. Ralph Crews, Charley Crews, Robert Crews, et al. Term No. 519. Petitions for writs of certiorari and exhibit thereto. Filed #518—filed September 29, 1944. #519—filed September 29, 1944. #541—filed October 2, 1944. Term No. 518 O. T. 1944. 519 O. T. 1944. 541 O. T. 1944.

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 518

M. C. GARBER, PETITIONER,

VS.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, NEE CREWS, AND MARY WILLIS, NEE CREWS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

P. C. SIMONS,
SIMONS, MCKNIGHT, SIMONS, MITCHELL & MCKNIGHT,
Attorneys for Petitioner.

INDEX

Statement of the Matter Involved 1
Stipulation as to no creditors of bank except plaintiffs 4
Stipulation of facts as to M. C. Garber 4
Quotation from findings of fact and conclusions of law 6

Statement As to Jurisdiction 9
The Questions Presented 10
Reasons Relied On for the Allowance of the Writ 11
Par. 64, Title 12, U. S. C. A. 11
Quotation from original opinion of circuit court of appeals 11
Quotation from opinion on petition for rehearing, circuit court of appeals 12
Quotation from original opinion of circuit court of appeals 15

Conclusion of Petition 16
Supporting Brief 17
Argument on Second Proposition 24

Opinion Circuit Court of Appeals 418- recor
Opinion on Petition for Rehearing and order denying 455-6- rec

AUTHORITIES CITED

Brown vs. Rosenbaum, 287 N. Y. 510, 41 N. E. 2d 77; Same case on Certiorari in United States Supreme Court, 62 S. Ct. 1282, 86 L. Ed. 1760 22
Brunswick Terminal Company vs. National Bank, 192 U. S. 386, 48 L. Ed. 491 23
Capital National Bank of St. Paul vs. Bartley et al., (Mont.) 56 Pac. 2d 728 27
Clinton Mining and Mineral Company vs. Beacom, 264 Fed. 228 26
Earle vs. Carson, 187 U. S. 42, 47 L. Ed. 373 19

Fowler vs. Crouse et al., 175 Fed. 646 ..... 22, 23
Hamilton vs. Offutt et al., 78 F. 2d 735 23
Hodges vs. Meriweather, 55 F. 2d 29 ..... 21, 23
Luikart vs. Jones, 293 N. W. 346 26
McDonald, Receiver, vs. Dewey et al., 202 U. S. 510, 50 L. Ed. 1128 20
Oppenheimer vs. Harriman National Bank and Trust Company, 201 U. S. 208, 81 L. Ed. 1042 ..... 24, 29
Schrader, Assignee, vs. The Manufacturers' National Bank of Chicago et al., 133 U. S. 67, 33 L. Ed. 564 24
Ward vs. Joslin, 186 U. S. 142, 46 L. Ed. 1093 25

Supreme Court of the United States

OCTOBER TERM, 194 7.

No. .....

M. C. GARBER, PETITIONER,

VS.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, NEE CREWS, AND MARY WILLIS, NEE CREWS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, M. C. Garber, respectfully shows to the court:

1.

STATEMENT OF THE MATTER INVOLVED.

An action was instituted in the District Court of Garfield County, Oklahoma, on December 14, 1931, by the re-

spondents as plaintiffs against the American National Bank of Enid and others as defendants and their amended petition upon which the case was tried, was filed in said court on July 8, 1933 (For this amended petition, see Record pages 236-284). This action came to trial in that court in the month of October, 1937, and resulted in a verdict and judgment thereon against the defendant, American National Bank of Enid alone on October 29, 1937, for the sum of $249,000 (For journal entry of that judgment, see Record pages 284-287). Upon trial of that case, the court sustained the demurrers of the individual defendants to the evidence and dismissed the case as to them. The individual defendants were part of the former directors of the American National Bank.

The basis of that action was that on June 13, 1922, the respondents, through their representatives, had entered into a contract with the Garber Refining Company of Garber, Oklahoma (see Record pages 282-284), whereby the Garber Refinery contracted to purchase from them the oil produced from certain lands belonging to them upon which the Sinclair Oil and Gas Company held an oil and gas mineral lease and they were engaged in litigation with it in which they sought to cancel the lease. The proceeds of the sale of this oil were to be deposited in the Farmers State Bank of Garber, Oklahoma, in escrow, out of which the respondents were to be paid their one-eighth royalty plus certain allowances for expenses of development and the balance was to be invested in United States Government Bonds, pending the outcome of such litigation.

A large amount of money was deposited in that bank over a period of years and in 1930 the litigation was compromised and the respondents made demand upon the Farmers State Bank of Garber for their bonds and money.

Soon thereafter events transpired which revealed the

fact that practically all of the money deposited in that bank and the bonds purchased therewith had been dissipated and that the bank was unable to produce the same.

The American National Bank had acted as a correspondent bank for the Farmers State Bank of Garber and the original action brought by the respondents against the American National Bank was instituted upon the contention made by them that certain of the officers and representatives of the American National Bank had aided and abetted the Farmers State Bank of Garber and certain of its officers and representatives in misappropriating and dissipating the funds deposited in that bank and the bonds purchased therewith.

The directors of the American National Bank who were individually made defendants in that action were exonerated but judgment was rendered against the bank. The officers and directors of the bank who were charged with the commission of the wrongful acts were named as defendants but no service of summons was ever had upon them and they never in fact became parties to the case.

After that judgment was obtained, this action was filed in the District Court of the United States for the Western District of Oklahoma to collect that judgment. The defendants were those who had been the stockholders and directors of the American National Bank. There were three causes of action set forth in the complaint involving the following state of facts:

On November 25, 1929, the American National Bank of Enid sold practically all of its assets and its business to the First National Bank of Enid, which on its part, assumed all of the known liabilities of the American National Bank. A copy of the contract between these banks is found in the record, pages 211-216. The First National Bank agreed to pay the American National Bank the sum

of $350,000 in addition to taking over responsibility for its deposits and all known obligations. Of this amount $240,000 in cash was paid to the American National Bank; $100,000 was retained to guarantee collection of the paper taken over by the purchasing bank; $10,000 by permitting the selling bank to retain certain real estate. This transaction was consummated on November 25, 1929, and the business and assets of the American National Bank were, on that date, turned over to the First National Bank of Enid and it took over the business.

It is an agreed fact in this case that the American National Bank of Enid was, up to that date, a solvent and going concern, leaving out of consideration the claim thereafter asserted by the respondents by the filing of their action against the American National Bank and some of its directors on December 14, 1931. Also, that there were no other creditors of the American National Bank than the respondents (See statement of matters stipulated at page 109 of Record).

> "(c) That there are no creditors of the American National Bank of Enid, other than the plaintiffs in this action."

The trial court in his findings of fact also made a finding to that effect (See Record page 134). The trial court also found (See Record page 134):

> "10. Until November 25, 1929, the bank was a going concern and was believed by all the defendants here defending to be a solvent as well as a going concern."

Stipulation of Facts As to M. C. Garber.

The following stipulation of facts relating to petitioner, M. C. Garber, was entered into (see Record page 113, paragraph 15):

"15. That on November 14, 1929, the defendant, M. C. Garber, for a valuable consideration sold and delivered to the defendant, D. J. Oven, his stock in the American National Bank of Enid, being 125 shares, and the certificate evidencing the same was duly endorsed by the said M. C. Garber and transferred to the said D. J. Oven; that such certificate was duly surrendered to the American National Bank of Enid, and a new certificate No. 100, for such 125 shares of stock was, on November 14, 1929, issued and delivered to the said D. J. Oven; that on November 14, 1929, and up to November 25, 1929, the date the American National Bank of Enid, sold its business and assets to the First National Bank of Enid, the American National Bank of Enid, was a solvent and going concern, not taking into consideration and excluding the claim of the plaintiffs in this case, upon which they filed suit on December 16 1931, and which claim was subsequently reduced to judgment in that action and is the $249,000.00 judgment which is the basis of this action; that the circumstances of such sale of his stock by the said M. C. Garber to the said D. J. Oven were that a few days prior to November 14, 1929, the said D. J. Oven went to the said M. C. Garber and sought to purchase from him his stock in the American National Bank. That the said M. C. Garber thereupon told him that he would take the matter under consideration and advise him later. That a few days later the said D. J. Oven again saw the said M. C. Garber, and the said M. C. Garber advised him that he had considered the matter and concluded that if the said D. J. Oven would buy his stock in the American National Bank and also some stock which he owned in the American National Mortgage Company and the American Building Company so as to clean up his investment in all these companies, that he would sell provided that they could agree upon the price.

"That they thereupon did agree upon the price for the stock of the said M. C. Garber in the American National Bank and in the other companies mentioned, the

total price for all being $25,625. That the sale was consummated on November 14, 1929, and the said D. J. Oven paid him for such stock by giving him a check for $625 and five promissory notes for $5,000 each due at intervals and which notes were paid before they became due in the month of December, 1929.

"That it shall be considered, that, subject to objection as to its competency, relevancy and materiality by plaintiffs, the defendant, M. C. Garber, testified: that at the time of such negotiations and of the consummation of the sale of such stock by M. C. Garber to D. J. Oven, on November 14, 1929, the said M. C. Garber had no information to the effect that the American National Bank contemplated selling its assets and business to the First National Bank and going out of business, and that at such time the defendant, M. C. Garber knew nothing of any claim by the plaintiffs against the American National Bank and believed the American National Bank to be fully solvent at such time, and had no knowledge of any impending failure of the American National Bank, and the sale of his stock by the said M. C. Garber was made in good faith and without any intention of trying to avoid liability as a stockholder in such bank."

In the Findings of Fact and Conclusions of Law made by the trial court, paragraphs 14 and 15 (see Record page 137) is the following:

"14. The defendant, M. C. Garber, at the solicitation of D. J. Oven (a defendant here), on November 14, 1929, sold the said D. J. Oven his entire holding of 125 shares of stock in the Bank, together with other stocks. The sale was consummated after several days consideration, the stock certificates regularly endorsed, delivered and surrendered for transfer, and a new certificate for the full amount thereof was issued and delivered to said D. J. Oven. The total consideration for the entire transaction was $25,625 which was paid in due course, and admittedly included a valuable consideration for the bank stock.

"15. The sale was made by Judge Garber, without any information on his part of any impending failure of the Bank, or that it contemplated going out of business or selling its assets, and without any knowledge that the Crews heirs had a claim against the bank, and in the belief that the Bank was solvent. His claim of good faith is not disputed."

The petitioner, M. C. Garber, owned 125 shares of stock of the par value of $100 per share in the American National Bank. On November 14, 1929, prior to the sale of its business by the American National Bank to the First National Bank of Enid, he sold all of this stock to D. J. Oven and on that day he surrendered his certificate of stock and the transfer was entered on the books of the bank and a new certificate was issued to the said D. J. Oven.

After the sale of its business by the American National Bank to the First National Bank of Enid, the sum of $240,000 was, by the directors of the American National Bank, paid back to those who were the stockholders of the American National Bank on November 25, 1929, representing the par value of their stock plus their proportionate part of the surplus of the bank. The petitioner, M. C. Garber, received no part of this fund, he not being a stockholder at that time.

In the first cause of action in this case, the plaintiffs as a judgment creditor of the American National Bank, sought to recover back from its stockholders the $240,000 which had been paid to them claiming that it constituted a trust fund for their benefit and which they were entitled to pursue and recover back.

In the second cause of action they sued the stockholders for double liability. M. C. Garber was made a defendant to this second cause of action and they sought to recover from him upon the theory that he had sold his stock within sixty days next before the date of the failure of the

American National Bank to meet its obligations or with knowledge of such impending failure.

The third cause of action was against a part of those who had been directors of the American National Bank claiming that they had violated their duties as such directors in disbursing this fund of $240,000 and paying the same back to the stockholders.

In the trial court the case was tried to the court without a jury and went to judgment on September 16, 1943 (see Record page 151). On the first cause of action, judgment was rendered against all of the stockholders for the amount of money which had been returned to them, representing their investment in the capital stock of the bank plus surplus.

On the second cause of action the court rendered a personal judgment against all stockholders for $15.17 per share and retained jurisdiction as to all matters pertaining to the necessity of and the making and enforcement of additional assessments against share holders and the liability therefor (see Record page 162).

It was on the second cause of action that judgment was rendered against the petitioner, M. C. Garber (see Record paragraph 13, page 158). It was from this judgment that he appealed to the United States Circuit Court of Appeals for the Tenth Circuit and which court, on July 6, 1944, rendered its judgment affirming the judgment of the trial court against this petitioner and rendered its opinion in said cause (see Record page 430-432.

Petitioner, M. C. Garber, as well as other appellants in that action, filed a petition for rehearing in the Circuit Court of Appeals and on August 26, 1944, that court by its order denied the petition for rehearing of the said M. C. Garber and filed an additional opinion as to him on rehearing on said date of August 26, 1944 (see Record page 455-456.

The third cause of action has gone out of the case. The trial court rendered judgment on that cause of action against those of the directors of the American National Bank who had been made defendants on that cause of action for $188,280 plus interest and costs. From that judgment, the directors prosecuted an appeal to the Circuit Court of Appeals and by which court that judgment was reversed with directions to dismiss such third cause of action and which reversal has become final.

Several Petitions for Certiorari will be presented to this court by certain of the original defendants in the first and second causes of action and which judgments were affirmed by the Circuit Court of Appeals, by its judgment and opinion of July 6, 1944, and whose petitions for rehearing were likewise overruled and denied on August 26, 1944, but inasmuch as all of such appeals and the Petitions for Certiorari presented by these separate petitioners in this court stem from the same case and are based upon the record in that case, but one transcript of the record will be sent to this court from the Circuit Court of Appeals for the Tenth Circuit and this Petition for Certiorari will be based upon such record as well as others that will be also filed.

STATEMENT AS TO JURISDICTION.

This court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of 28 U. S. C. A., Section 347. The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 6, 1944; Petition for Rehearing denied August 26, 1944.

The date of this Petition for Certiorari is September 25, 1944.

THE QUESTIONS PRESENTED.

1. Whether the petitioner as a former stockholder in the American National Bank of Enid, Oklahoma, is subject to assessment as a stockholder in said bank under the provisions of Para. 64, Title 12, U. S. C. A., he having made a *bona fide* sale of his stock for valuable consideration in good faith on November 14, 1929, more than sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure and where, at the time of such sale, such bank was a solvent and going concern except for an undisclosed and unknown liability to a creditor which was not asserted until a suit was filed by such creditor on such claim more than one year subsequent to the sale by petitioner of his stock, and where such claim was unknown to the creditor filing such suit for more than a year after the sale of such stock and upon which claim the creditor recovered a judgment against such bank on October 29, 1937, nearly eight years after the sale by petitioner of his stock in said bank, and where it is an agreed fact in the case that except that the bank in question was a solvent and going concern and that there is no other creditor of said bank, and where the sale of such stock was made by petitioner in good faith and without any intention of trying to avoid liability as a stockholder in such bank.

2. Whether a stockholder or former stockholder in a national bank is subject to assessment under the double liability provisions of Sec. 64, Title 12, U. S. C. A., for the payment of a judgment against the bank based upon a tort arising out of the wrongful acts of some of its officers and representatives and whether a judgment based upon such tort is embraced within the language "contracts, debts and engagements of such association."

3. The lower court erred in holding that the cause of action of the plaintiffs against this petitioner, defendant, was not barred by the Statute of Limitations of the State of Oklahoma and by reason of laches.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The interpretation placed by the Circuit Court of Appeals upon that part of the language of Par. 64, Title 12, U. S. C. A., reading as follows:

> "The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer,"

is erroneous and is in conflict with the applicable decisions of this court and other federal courts and of state courts and the interpretation so placed upon that part of Section 64 is not the correct or true meaning thereof.

That the Circuit Court of Appeals in its original decision disposed of this question in the following language quoted therefrom (see Record page 430)

"Insolvency of the Bank."

> "The American National Bank closed its doors as a banking institution on the evening of November 25, 1929. Thereafter it did no banking business. The $240,000 involved in this suit was distributed to the stockholders in December, 1929. After its distribution, the only asset the bank had was the right to receive an additional $100,000 from the First National Bank of Enid when the paper which it had guaranteed was

paid, but its total liability on its guarantee of paper amounted to $138,591.48. In addition, it had outstanding appellees' claim of $249,000.

"A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Sec. 21 *et seq.*, when it is unable to meet its obligations when they mature. While appellees' claim was contingent and unknown at the time the bank closed its doors, it must be considered in determining the solvency of the bank. It is quite obvious that the American National Bank was wholly unable at any time after it closed its doors on the evening of November 25, 1929, to meet its obligations and that its insolvency dates from that time. All stockholders, including appellant, M. C. Garber, in No. 2783, who transferred their stock within sixty days prior to November 26, 1929, were liable for the stock assessments even though the transfers were made in good faith."

In its opinion on Petition for Rehearing handed down on August 26, 1944, the Circuit Court of Appeals again considered this question and disposed of it in the following language, to-wit (See Record, page 453)

"M. C. Garber, appellant in Number 2873, has filed a petition for rehearing in which he contends that we misinterpreted 12 U. S. C. A., Sec. 21 *et seq.*, as it affects the liability of one who transfers stock in a banking institution. It is contended that we established the date on which it was determined that the bank was insolvent in the sense that its liabilities exceeded its assets rather than the date on which the bank failed to meet its obligations when they matured as the date which determines the liability of one transferring stock. With this we cannot agree. We agree that it is the date on which a bank fails to meet its obligations that determines the liability of one transferring his stock. It is true that the word 'insolvency' is not used in the applicable statute. The opinion could well have omitted the use of the word 'insolvency.' However,

there can be no question as to the sense in which we used the term. We defined insolvency for the purpose of determining the liability of one transferring stock as being the failure of a bank to meet its obligations when they mature. We said: 'A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Sec. 21 *et seq.*, when it is unable to meet its obligations when they mature.' Inability to meet its obligations is the test which establishes the liability of one transferring stock. We do not understand the law to require that a claim be actually presented for payment and that payment be refused before liability attaches. We know of no case holding to that effect. Certainly the case of *Brown* v. *Rosenbaum*, 41 N. E. 2d 77, upon which appellant relies, does not so hold. It holds that where a bank is closed and a conservator is appointed, the day on which the bank was closed may determine both the date on which the rights of creditors and the liabilities of stockholders attach. In *People* v. *Merchants' Trust Co.*, 79 N. E. 1004, it was held that the appointment of a temporary receiver and the taking of assets by him operated to prevent the defendant from paying the claims of creditors and therefore obviated the necessity of a formal demand for payment. In *Broderick* v. *Aaron*, (N. Y.) 197 N. E. 274, 103 A. L. R. 684, the superintendent of banks took possession of a bank on December 11, 1930. It did not appear that on that date the bank was actually insolvent. The court held that 'none the less the closing of the bank occasioned an automatic default in the payment of its debts and liabilities.'

"Garber sold his stock November 14, 1929. The bank disposed of its business and closed its doors November 25, 1929, and did not function as a banking institution thereafter. It went into voluntary liquidation and appointed a liquidating agent December 20, 1929. The directors distributed the $240,000 received from the First National Bank of Enid some time in December, 1929, to the stockholders of record as of November 25. Thereafter the bank had not a single dollar

with which to meet any claim. Its doors were closed and it had ceased to function as a banking institution. The presentation of a claim for payment after that would have been a mere formality. By this course of conduct the bank automatically disqualified itself from meeting any of its obligations. To hold that it was still necessary that a claim be presented and dishonored before a stockholder's liability attached would be adopting a strained construction, entirely out of line with the purpose sought to be accomplished by the statute.

"The petition for rehearing is Denied."

We contend that this additional opinion by the Circuit Court of Appeals is likewise an erroneous interpretation of the federal statute in question and in conflict with the applicable decisions of this court and other federal courts and state courts.

2. The Circuit Court of Appeals erroneously interpreted that part of the language of Sec. 64, Title 12, U. S. C. A., providing that the stockholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association each to the amount of his stock therein for a judgment rendered against such bank based upon a tort and which interpretation, we contend, is in conflict with the applicable decisions of this court, other federal courts and state courts. The Circuit Court of Appeals held that a stockholder in a bank was liable under the provisions of the double liability law for the payment of a judgment against the bank based upon tort, and that such a judgment came within the classification "contracts, debts and engagements of such association." This, we contend, is an erroneous interpretation placed upon the language above quoted and that a stockholder is not liable under the double liability law for the payment of a judgment based upon tort arising out of the wrongful acts of its officers, agents and employees.

In deciding this question, the Circuit Court of Appeals disposed of the matter in the following language (see Record page 42):

"Liability Not Within 12 U. S. C. A., Secs. 63, 64."

"It is contended that the transaction out of which appellees' judgment arose did not constitute a 'contract, debt or engagement,' as those terms are used in 12 U. S. C. A., Secs. 63, 64, for which stockholders become liable for assessment upon their stock. Authorities are cited in support of the contention that a judgment against a bank based on tort is not a contract, debt, or engagement of the bank within the meaning of similar statutory provisions. We deem it unnecessary to discuss these decisions, because we believe that as far as the national bank act is concerned, the question is settled by the decision of the Supreme Court in *Oppenheimer* v. *Harriman Bank*, 201 U. S. 206. In that case the Supreme Court interpreted these very terms of the statute. The judgment there also sounded in tort. Involved was the right of the holders of such a judgment to have it satisfied out of the assessments on stockholders' liability. The court pointed out that the statute should be reasonably construed in favor of claimants. Speaking of the terms 'contracts,' 'debts,' and 'engagements,' the court said:

> 'They are broad enough to include all pecuniary liabilities and obligations of the bank. Indeed, that is a well-recognized meaning of the word "engagement." Plaintiff's claim is for the money the bank fraudulently got from him and used in its business. Clearly that liability is covered by the phrase "contracts, debts and engagements" (Page 213).'

The construction for which appellants contend cannot be sustained."

It will be observed that the Circuit Court of Appeals rested its decision on the decision of this court in the case

of *Oppenheimer* v. *Harriman Bank*, 201 U. S. 206, 81 L. Ed. 1042, in which this court used the following language:

> " 'contracts, debts and engagements' used in the above section, includes all pecuniary liabilities and obligations of the bank."

We contend that there is a clear distinction between the facts in that case and the ones in the case at bar and that it was not intended by this court in using the language quoted to mean that a stockholder of a bank becomes liable for all of the torts committed by the officers and agents and employees of the bank and that if the language used by this court is susceptible of that interpretation and meaning, then that question should be reconsidered by this court for the reason that it is in conflict with former decisions of this court and other federal courts and this question should be set at rest by this court in unequivocal language and which is a matter of great importance to the national banking business generally.

3. This assignment involves the question of the Statute of Limitations and of laches which will be referred to in the supporting brief.

In order to avoid duplication, we will further present our reasons relied on for the allowance of the Writ in our supporting brief hereunto annexed.

For these reasons it is respectfully submitted that this petition should be granted.

P. C. SIMONS,
SIMONS, MCKNIGHT, SIMONS, MITCHELL & MCKNIGHT,
Attorneys for Petitioner.

SUPPORTING BRIEF.

Upon the question of the interpretation of that part of Par. 64, Title 12, U. S. C. A., providing that stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations or with knowledge of such impending failure shall be liable to the same extent as if they had made no such transfer.

The American National Bank never did fail as a bank; there was no failure on its part to meet its obligations within sixty days from November 14, 1929, the date when M. C. Garber sold his stock to D. J. Oven. The bank sold its asets and business to the First National Bank of Enid, Oklahoma, on November 25, 1929, and the purchasing bank assumed responsibility for its deposits and all of its known obligations. The claim of the plaintiffs (respondents) was not asserted until they filed their suit against the American National Bank on December 14, 1931. They did not know that they had any such claim until within a year prior to the filing of their suit. In the meantime, the American National Bank was voluntarily liquidated. No receiver or conservator was ever appointed for it. Upon closing out its business it refunded to the stockholders their investment in the capital stock and surplus of the bank, no part of which was received by M. C. Garber, and no claim was made against him on the first cause of action. He is only interested in the claim asserted in the second cause of action under the double liability provisions of Section 64.

We have heretofore quoted the decision of the Circuit Court of Appeals disposing of this question both in its original opinion and on rehearing.

Not a suggestion can be found in the record of any obligation or claim which the American National Bank failed to meet within sixty days after November 14, 1929, the date of the sale of his stock by petitioner, nor for a much longer period, the fact being as found by the lower court that there is no other creditor than the plaintiffs (respondents) in this case.

The statute under which the plaintiffs (respondents) seek to fasten liability on M. C. Garber, was passed for the purpose of preventing stockholders in a bank which was about to fail or who had knowledge of its impending failure from transferring their stock to irresponsible persons and thereby evading liability to the creditors of the failing bank and holding the stockholder liable if he made such a sale within such period of time.

The Circuit Court of Appeals fell into an error in interpreting the part of Section 64 in question and in holding that a stockholder who had sold his stock was liable under the double liability provision if such bank was insolvent at the time of such sale notwithstanding the fact that it was a going concern and continued to be for more than sixty days after such sale and in holding that the judgment recovered by the plaintiffs (respondents) against the bank on October 29, 1937, was retroactive and rendered the bank insolvent on November 25, 1929, the date when it sold its business and assets and that it was unable to pay its obligations and therefore had failed to meet its obligations on that date on account of the adjudication of the claim of plaintiffs (respondents) nearly eight years thereafter.

Such interpretation we contend, is clearly in conflict with the former decisions of this court, other federal courts and state courts.

The statute in question does not in words prohibit the sale of stock when a bank is insolvent as insolvency is properly defined and interpreted by the decisions of this court, but only creates such liability where the stock is sold within sixty days next before the failure of the association to meet its obligations or with knowledge of such impending failure.

Even if the word insolvent had been used, it would not justify the finding of the trial court in this case or the decision of the Circuit Court of Appeals that the American National Bank was insolvent on November 14, 1929, and on November 26, 1929, the day after it ceased to do business. The court found that the bank was solvent at those times excluding the claim of the Crews heirs and could only find that the bank was insolvent upon the theory that the judgment obtained by them on October 29, 1937, was retroactive for the purpose of determining not only the solvency of the bank but that the bank had failed to meet its obligations within sixty days after November 14, 1929, which we contend is not the law and cannot be true under the situation in this case.

One of the land-marks in the adjudicated cases on this question is *Earle* v. *Carson*, 187 U. S. 42, 47 L. Ed. 373, in which the opinion was written by Mr. Justice White, and while it is true that this case was decided prior to the adoption of the amended Section 64, nevertheless the rules of construction laid down in this decision are just as applicable to the amended statute as to the original Section 63.

In the opinion in this case, the court uses the following language:

> "The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the

consequences of the sale are avoided if subsequently it develops that the bank was insolvent at the time of transfer in the sense that its assets were then unequal to the discharge of its liabilities when such fact was unknown to the seller of the stock at the time of the sale."

Further on in this opinion in discussing the question of what is meant by the term "insolvency" of a bank, the court clarifies that expression by the following language:

"The error of the argument arises from the fact that it affixes to the word 'insolvency' as found in the sentences quoted, the erroneous import hitherto pointed out; that is, an inadequacy of the assets of a bank to pay its liabilities, instead of giving to it its true meaning, that of failure and consequent suspension of business."

It is referred to and reaffirmed in the case of *McDonald, Receiver*, v. *Dewey et al.*, 202 U. S. 510, 50 L. Ed. 1128. From this case we take the following:

" 'Certainly,' said Mr. Justice White in the opinion (p. 46, L. Ed., p. 376, Sup. Ct. Rep., p. 256), 'it cannot in reason be said that the power would exist to sell stock like any other personal property, if, before the power could be exercised, the seller must examine the affairs of the bank, marshal its assets and liabilities, in order to form an accurate judgment as to the precise condition of the bank.'

"In discussing the question in regard to the validity of the transfer, it was said (p. 49, L. Ed., p. 377, Sup. Ct. Rep., p. 257) that 'the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that, where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it

developed that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale.'"

* * * * * * *

"1. We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling with notice of the insolvency of the bank, and with intent to evade the double liability imposed upon the stockholder by the national banking act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. This was practically the rule in *Earle* v. *Carson*, in which we held that a *bona fide* sale would not be void, though the vendee were insolvent, if the fact of such insolvency were at the time unknown to the seller. The case of *Earle* v. *Carson*, so far from lending countenance to the argument of the appellees, bears strongly in the opposite direction."

We next call attention to the case of *Hodges* v. *Meriweather*, (C. C. A. 8) 55 F. 2d 29. This is a case decided under the provisions of Section 64. The third paragraph of the syllabus reads as follows:

"3. Banks and Banking 249 (1).

"Stockholders, transferring shares *bona fide* over 60 days from bank's failure, without knowing or having reason to believe that bank is insolvent, is not

subject to stockholder's liability (12 U. S. C. A., Sec. 64)."

We next refer to the case of *Fowler* v. *Crouse et al.*, (C. C. A.) 175 Fed. 646, the first paragraph of the syllabus reads as follows:

> "1. Banks and Banking (Section 249)—National Banks—Double liability of stockholders—Transfer of stock.
>
> "A Stockholder in a national bank divests himself of the double liability imposed by the statute for the protection of creditors by a transfer of his stock when the bank is solvent, or even if insolvent, by a *bona fide* transfer without knowledge of the insolvency; the only ground for holding him liable after a transfer being fraud."

The exact question involved in this case has been passed upon in the case of *Brown* v. *Rosenbaum*, (Ct. App. N. Y.) 287 N. Y. 510, 41 N. E. 2d 77. Certiorari denied by the United States Supreme Court May 25, 1942; 62 S. Ct. 1282, 86 L. Ed. 1760. This case interprets the provisions of Section 64 and as to what is meant by the language "failure of such association to meet its obligations or with knowledge of such impending failure," and if the law is as stated in this decision, which has been approved by this court by its refusal to grant certiorari, then there is no question but what this judgment against M. C. Garber must be reversed. We adopt the following extract from that case as a part of our argument. The first head-note in the above entitled case reads as follows:

> "1. Banks and Banking 248 (1).
>
> "A bank has not failed to meet its obligations within statute imposing liability on stockholders of national bank which fails to meet its obligations, so long as the bank pays its obligations at the time and place they are payable."

* * * * * * *

"Congress has not, however, provided that the liability of stockholders like the rights of creditors against an insolvent bank, attaches at the date of an 'act of insolvency.' Congress has expressly provided that liability of stockholders of an insolvent banking association attaches and becomes fixed upon 'the date of the failure of such association to meet its obligations.' The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; *the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches.* Often, perhaps usually, the dates will coincide—not always (Emphasis ours)."

Again in the opinion in that case, that court said in referring to the date when a bank fails to meet its obligations as follows:

"The Comptroller of the Currency is not charged with the responsibility to fix that date. It is fixed according to statute by an act of default, not by an act of insolvency, and the courts must determine when such an act has occurred."

We earnestly request this court to examine the entire opinion in the above case.

In further support of our contention, we cite the following cases:

Fowler v. *Crouse et al.*, (C. C. A.) 175 Fed. 646.
Hodges v. *Meriweather*, (C. C. A.) 55 F. 2d 29.
Hamilton v. *Offutt et al.*, 78 F. 2d 735.
Brunswick Terminal Company v. *National Bank*, 192 U. S. 386, 48 L. Ed. 491.

2. Upon the question of the interpretation of that part of Par. 64, Title 12, U. S. C. A., providing that the stockholders of every national banking association shall be held individually responsible for all "'contracts, debts and engagements' of such association, etc."

We have heretofore quoted the language of the Ciruit Court of Appeals in disposing of this question. Before discussing the case of *Oppenheimer* v. *Harriman National Bank and Trust Company*, to which reference has heretofore been made in our assignment of reasons for the issuance of the writ, we desire to refer to former decisions of this court and other courts and then discuss it last.

That the judgment sought to be enforced in this case is based upon a tort, is an undisputed fact in this case. In the opinion of the Circuit Court of Appeals (see Record page 425) it is said:

> "Appellees' claim was an unliquidated demand founded in a tort of a very controversial nature, as is evidenced by the fact that the judgment was sustained by the Supreme Court by a bare majority."

This judgment may be enforced by the respondents by subjecting thereto any assets belonging to the American National Bank as a bank, but this does not include the liability created by statute for the benefit of creditors casting a double liability upon a stockholder for all "contracts, debts and engagements" of the bank. The language quoted, we contend, refers to contractual obligations, express or implied. This court has spoken on this question several times.

We first call attention to the case of *Schrader, Assignee*, v. *The Manufacturers' National Bank of Chicago et al.*, (U. S.) 33 L. Ed. 564, 133 U. S. 67, and copy there-

from the first paragraph of the syllabus and extracts from the opinion, which read as follows:

> "1. The individual liability of the stockholders of the national banks, as imposed by and expressed in the statute, is for all the contracts, debts and engagements of such banks, but is restricted to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business."
>
> * * * * * * *
>
> "The individual liability of the stockholders, as imposed by and expressed in the statute, is indeed for all the contracts, debts and engagements of such association, but that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business."

We next call attention to the case of *Ward* v. *Joslin*, (U. S.) 46 L. Ed. 1093, 186 U. S. 142, and take from the opinion in that case the following extracts:

> "* * * In *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. Ed. 587, 20 Sup. Ct. Rep. 477, it was said that 'the word "dues" is one of general significance, and includes all contractual obligations.' Can an obligation which a corporation had no right to incur be a contractual obligation and the basis of 'dues,' as that word is used in the State Constitution? We do not think so. It appears to us that it was not intended by that instrument to impose individual liability on stockholders in respect of risks which they had not undertaken.
>
> "One of the grounds on which the doctrine of *ultra vires* rests, is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation."

This question has engaged the attention of the courts, both State and Federal, many times, and in support thereof we call attention to the case of *Clinton Mining and Mineral Company* v. *Beacom*, 264 Fed. 228. This was an action in which the plaintiff, a corporation of the State of Iowa, recovered a judgment in an action of tort against the Imperial Gold Mining and Milling Company, a corporation of the State of South Dakota. The judgment being unpaid, the plaintiff brought the action against the defendant as a stockholder of the Imperial Company to recover for an alleged balance unpaid upon his stock. The action was brought under Section 441 of the Civil Code of South Dakota, which provided that each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him, and that any creditor of the corporation may institute joint or several actions against any of its stockholders that have not fully paid the capital stock held by them, etc.

We next call attention to the case of *Luikart* v. *Jones*, 293 N. W. 346. This was an action to recover double liability from stockholders of the Bank of Benkelman, Nebraska, by the receiver of that bank under the provisions of Section 7, Article XII, of the Constitution of Nebraska, which was in force at the time of the transaction involved, but was thereafter repealed. From the opinion in that case we extract the following:

> " 'Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof.' *Luikart* v. *Paine*, 126 Neb. 251, 253 N. W. 86."
>
> * * * * * * *
>
> "(5) If it be found that these acts took place in violation of the strict terms of the law, then the

attempted liquidation would be *ultra vires* and stockholders are not liable for unauthorized or *ultra vires* acts or debts of a bank, unless they have assented thereto, or estopped themselves from denying liability to the same (C. J. S., Banks and Banking, 156, Sec. 80).

"It has been held that when a stockholder is sued by virtue of his constitutional and statutory liability, he is liable only for indebtedness incurred in the transaction of the legal and contemplated business of the corporation, and it is pointed out that 'One of the grounds on which the doctrine of *ultra vires* rests, is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation.' *Ward* v. *Joslin*, 186 U. S. 142, 22 S. Ct. 806, 810, 46 L. Ed. 1093."

This exact question has been passed upon in the case of *Capital National Bank of St. Paul* v. *Bartley et al.*, (Mont.) 56 Pac. 2d 728. This was an action brought by the Capital National Bank of St. Paul against Anna H. Bartley and another as executors of the last will of P. B. Bartley, deceased, and others for the purpose of compelling the estate of P. B. Bartley, deceased, to contribute with Bartley's co-stockholders in the Conrad Trust and Savings Bank of Helena toward the satisfaction of a judgment secured by it against the Conrad Bank. The judgment in question was based upon a cause of action for tort and the judgment creditor sought to enforce this judgment against the stockholders of the Conrad Bank under the double liability provision of the Montana statute which is identical with the Federal Statute, Sec. 5151, U. S. C. A., Title 12, Par. 63.

In that case the defendants raised the identical question that we are raising in the case at bar to the effect that a cause of action for tort is not embraced within the expression "contracts, debts and engagements" of the bank.

The Supreme Court of Montana, in an elaborate opinion in the foregoing case, which we adopt as a part of our argument, reviews, the authorities, both state and federal, and holds that a judgment against a bank for a tort cannot be enforced against the stockholders of the bank under the double liability provision for "contracts, debts and engagements" of the bank.

We copy the second, third and fourth paragraphs of the syllabus in that case, which are as follows:

"1. Banks and banking. Key 47 (1).

"Double liability of bank stockholders was not known to common law and would not exist but for statute (Laws, 1927, Ch. 89, Par. 21).

"2. Banks and banking. Key 47 (1).

"Words 'contracts, debts and engagements,' within statute imposing liability on bank stockholders for all contracts, debts, and engagements of bank to extent of amount of their stock therein, held not to comprehend every kind of liability (Laws, 1927, Ch. 89, Par. 21).

"3. Banks and banking. Key 47 (1).

"Terms 'contracts' and 'engagements,' within statute imposing double liability on bank stockholders for all contracts, debts, and engagements of bank to extent of amount of their stock therein, have much the same meaning, 'engagements' being sometimes defined as *quasi* contracts, and each term denotes a voluntarily assumed obligation and does not include torts (Laws, 1927, Ch. 89, Par. 21; Rev. Codes, 1921, Par. 7467).

"4. Banks and banking. Key 47 (1).

"Statute imposing liability upon bank stockholders for all contracts, debts, and engagements of bank to extent of amount of their stock therein, held not to extend liability to torts or to judgments secured on tort actions; term 'debts' not covering torts (Laws, 1927, Ch. 89, Par. 21; Rev. Codes, 1921, Par. 7467)."

The opinion in that case is a brief on the question involved in this application and we request the court to examine the same in its entirety.

Passing now to the case of *Oppenheimer* v. *Harriman National Bank and Trust Company*, 201 U. S. 206, 81 L. Ed. 042, upon which the Circuit Court of Appeals rested its decision, we find that it was an action brought by Oppenheimer as plaintiff against the Harriman National Bank nd Trust Company as a bank upon an executed recision of sale to him of stock of the bank by the officers of the bank nd in which transaction he had purchased ten shares of he bank's stock for $15,120 and paid for it out of the money hich he had on deposit in the bank. He thereafter rescinded the contract and sued to recover his money back. n that case Mr. Justice Butler in delivering the opinion of is court said:

"For some years prior to the occurrences out of which this litigation arose, the defendant bank was doing business in New York City. Being unable to meet current demands, it closed March 3, 1933. March 13th a conservator was appointed. October 16th the comptroller declared it insolvent and appointed a receiver. Later, he assessed the stockholders par value of their stock. May 31st Oppenheimer brought this action in the Federal Court for the Southern District of New York, to recover damages upon an executed recision of a sale to him of stock of the bank by means of fraudulent representations made by its president and vice-president."

Oppenheimer sought to enforce his judgment out of the assets of the failed and insolvent bank, which were in the hands of a receiver appointed by the Comptroller of the Currency and which assets include the 100% assessment levied against the stockholders by direction of the Comptroller of the Currency. It is so well settled that an assessment made by order of the Comptroller of the Currency against the stockholders of an insolvent bank is a finality and that the funds derived therefrom become assets of the bank for the benefit of its creditors, that no citation of authorities in support thereof is necessary. Further on in the opinion, the court says:

> "3. Defendant maintains that the proceeds of assessments may not be charged with the claim of rescinding shareholder.
>
> "It argues that, the bank being insolvent and in receivership, the recovery cannot be had from the assets of the bank and will of necessity come out of the money paid by shareholders. It calls attention to Section 64 which declares that stockholders shall be held individually responsible for all 'contracts, debts, and engagements' of the bank.
>
> "But that contention misconstrues the judgment directed below. It is to be 'collectible out of the assets of the receivership after payment in full' of others. Manifestly the assets referred to are not limited to assessments collected from stockholders but include assets passing from the bank to the receiver. The phrase quoted * * * (213) from * * * Section 64 relates to the liability of stockholders enforceable upon finding of insolvency, appointment of receiver and assessment by the comptroller, and not to provability or rank of claims. His determination as to the necessity of and amount of assessments against shareholders is conclusive upon him and immune from collateral attack. The bank may not in this suit invoke the rights of stockholders to defeat plaintiff's claim against it."

Further on in the opinion, the court also says that a claim such as was asserted by the plaintiff in this case against the bank for the money that the bank got from the plaintiff for the purchase price of its stock is covered by the phrase "contract, debts and engagements" and also holds that the plaintiff Oppenheimer, was entitled to share equally in the receivership estate with other unsecured creditors' claims.

We think that this explanation of the case shows the distinction between it and the case at bar where in the Oppenheimer case the plaintiff was seeking to enforce his claim and judgment against the assets of the bank which had been collected by the receiver and were in his hand for the purpose of being applied to claims against the bank which is an entirely different proposition from the case at bar where the plaintiffs bring suit directly against the stockholders under the provisions of Pars. 63 and 64, Title 12, U. S. C. A.

We call especial attention to the closing paragraph of the above quotation from the decision of this court in the Oppenheimer case:

> "The bank may not in this suit invoke the rights of stockholders to defeat plaintiff's claim against it."

This would seem to imply that a stockholder could have made the defense that he was not liable where the bank could not.

We think that this court should review the Oppenheimer case and the other authorities cited and make it definite and clear as to whether or not under this double liability statute a stockholder can be made liable for the payment of a judgment based on tort against the bank and which we contend is not the intent of the statute.

3. As to Reason No. 3, referring to the question of the Statute of Limitations and laches, these questions will be presented in the event Certiorari is granted and the court comes to a consideration of the case upon its merits, but as these questions standing alone would probably not impel the court to grant Certiorari, we will refrain from discussing them at this time.

We submit that for all of the reasons heretofore given, this court should grant the prayer of the petition of the petitioner.

P. C. SIMONS,
SIMONS, MCKNIGHT, SIMONS, MITCHELL & MCKNIGHT,
Attorneys for Petitioner.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 518.

M. C. GARBER, PETITIONER,

VS.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, NEE CREWS, AND MARY WILLIS, NEE CREWS, RESPONDENTS.

BRIEF OF PETITIONER.

P. C. SIMONS,
Enid, Oklahoma,
Attorney for Petitioner.

INDEX

Statement of Case 1
Jurisdiction 2
Statement of the Matter Involved 2
Quotation from Amended Petition in State Court 9
Stipulation As to No Creditors of Bank, Except Plaintiffs (Respondents) 10
Stipulation of Facts As to M. C. Garber 11
The Question Presented 14

Argument (Commencement)

Quotation from Original Opinion of Circuit Court of Appeals 16
Quotation from Opinion on Petition for Rehearing, Circuit Court of Appeals 17
Quotation from Opinion Circuit Court of Appeals As to All Claims Being Paid 20
Paragraph 64, Title 12, U. S. C. A. 22

Conclusion 44

OPINIONS IN THIS CASE

Original Opinion Circuit Court of Appeals
Opinion Circuit Court of Appeals on Rehearing

AUTHORITIES CITED

Aycock vs. Bradley, 77 F. 2d 14 41
Broderick vs. Aaron, (N. Y.) 197 N. E. 274 34
Brown vs. Rosenbaum, 287 N. Y. 510, 41 N. E. 2d 77; same case on certiorari in United States Supreme Court, 62 S. Ct. 1282, 86 L. Ed. 1760 ..... 31, 33, 34
Brunswick Terminal Company vs. National Bank, 192 U. S. 386, 48 L. Ed. 491 39
Chase vs. Curtis, 113 U. S. 452, 28 L. Ed. 1038 38

Earle vs. Carson, 187 U. S. 42, 47 L. Ed. 373 ..... 24, 27
Fowler vs. Crouse et al., 175 Fed. 646 28
Hamilton vs. Offutt et al., 78 F. 2d 735 39
Hodges vs. Meriweather, 55 F. 2d 29 28
Kullman & Company vs. Woolley, 83 F. 2d 129 42
McDonald, Receiver, vs. Dewey et al., 202 U. S. 510, 50 L. Ed. 1128 27
People vs. Merchants' Trust Company, 79 N. E. 1004 36
Scott vs. Commissioner, 117 F. 2d 36 ..... 42, 43
Swan Land and Cattle Company vs. Frank, 148 U. S. 603 38
Smith vs. Witherow, 102 F. 2d 638 40

STATUTES

28 U. S. C. A., Sec. 347 2
U. S. C. A., Par. 64, Title 12 ..... 14, 16, 19
12 U. S. C. A., Par. 182 20

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 518.

M. C. GARBER, PETITIONER,

VS.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, NEE CREWS, AND MARY WILLIS, NEE CREWS, RESPONDENTS.

BRIEF OF PETITIONER.

STATEMENT OF CASE.

By this proceeding, the petitioner seeks a review of a judgment of the United States Circuit Court of Appeals, Tenth Circuit, affirming a judgment of the District Court of the United States for the Western District of Oklahoma, against petitioner in an action wherein respondents were plaintiffs and petitioner was a defendant, and for a reversal of such judgments.

The judgment of the Circuit Court of Appeals sought to be reviewed, was entered on July 6, 1944; Petition for Rehearing denied August 26, 1944. The opinion delivered by the Circuit Court of Appeals has not yet been printed in the official reports but is found in advance sheet of November 6, 1944, Federal Reporter, Second Series, page 665, under the title, *Hoehn et al.* v. *Crews et al.*, and Six Other Cases, Nos. 2870-2876. This original opinion is also found in the printed record in this case commencing on page 108, and the opinion on Rehearing commencing on page 131.

Certiorari was granted by this court on November 13, 1944, limited to the first question presented by the Petition for the writ. Other Petitions for Certiorari arising out of the same case were denied.

JURISDICTION.

This court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of 28 U. S. C. A., Sec. 347.

STATEMENT OF THE MATTER INVOLVED.

An action was instituted in the District Court of Garfield County, Oklahoma, on December 14, 1931, by the respondents as plaintiffs against the American National Bank of Enid and others as defendants, and their Amended Petition upon which the case was tried was filed in said court on July 8, 1933 (See Record page 102; Original Transcript page 236).

This action came to trial in that court in the month of October, 1937, and resulted in a verdict and judgment therein against the defendant, American National Bank of Enid, alone on October 29, 1937, for the sum of $249,000

(for Journal Entry of that Judgment, see Record, pages 104-107). Upon the trial of that case, the court sustained the demurrers of the individual defendants to the evidence and dismissed the case as to them. The individual defendants were part of the former directors of the American National Bank.

The basis of that action was that on June 13, 1922, the respondents, through their representatives, had entered into a contract with the Garber Refining Company of Garber, Oklahoma (See Original Transcript pages 282-284), whereby the Garber Refinery contracted to purchase from them the oil produced from certain lands belonging to them upon which the Sinclair Oil and Gas Company held an oil and gas mineral lease and they were engaged in litigation with it in which they sought to cancel the lease.

The proceeds of the sale of this oil were to be deposited in the Farmers State Bank of Garber, Oklahoma, in escrow, out of which the respondents were to be paid their one-eighth royalty plus certain allowances for expenses of development and the balance was to be invested in United States Government Bonds pending the outcome of such litigation.

A large amount of money was deposited in that bank over a period of years and in the month of October, 1930, the litigation was compromised and the respondents made demand upon the Farmers State Bank of Garber for their bonds and money.

Soon thereafter events transpired which revealed the fact that practically all of the money deposited in that bank and the bonds purchased therewith had been dissipated and that the bank was unable to produce the same.

The American National Bank had acted as a correspondent bank for the Farmers State Bank of Garber and

the original action brought by the respondents against the American National Bank and some of its directors on December 14, 1931, was instituted upon the contention made by them that certain of the officers and representatives of the American National Bank had aided and abetted the Farmers State Bank of Garber and certain of its officers and representatives in misappropriating and dissipating the funds deposited in that bank and the bonds purchased therewith.

The directors of the American National Bank who were individually made defendants in that action were exonerated but judgment was rendered against the bank.

The officers and directors of the American National Bank who were charged with the commission of the wrongful acts were named as defendants, but no service of summons was ever had upon them and they never, in fact, became parties to the case.

After that judgment was obtained by the respondents as plaintiffs against the American National Bank, this action was filed in the District Court of the United States for the Western District of Oklahoma to collect that judgment. The defendants were those who had been the stockholders and directors of the American National Bank. There were three causes of action set forth in the complaint involving the following state of facts:

On November 25, 1929, the American National Bank of Enid sold practically all of its assets and its business to the First National Bank of Enid, which on its part assumed all of the known liabilities of the American National Bank. A copy of this contract between these banks is found in the Record, pages 88-93 (Original Transcript pages 211-216). The First National Bank agreed to pay the American National Bank the sum of $350,000 in addition to taking over responsibility for its deposits and all

known obligations. Of this amount $240,000 in cash was paid to the American National Bank; $100,000 was retained to guarantee collection of the paper taken over by the purchasing bank; $10,000 by permitting the selling bank to retain certain real estate. This transaction was consummated on November 25, 1929, and the business and assets of the American National Bank were on that date, turned over to the First National Bank of Enid, and it took over the business.

After the sale of its business by the American National Bank to the First National Bank of Enid, and provision having been made for the payment of all of the known obligations of the American National Bank, the sum of $240,000 was by the directors of the American National Bank, paid back to those who were the stockholders of the American National Bank on November 25, 1929, representing the par value of their stock plus their proportionate part of the surplus of the bank. The petitioner, M. C. Garber, received no part of this fund, he not being a stockholder at that time.

In the first cause of action in this case, the plaintiffs, as a judgment creditor of the American National Bank, sought to recover back from its stockholders, the $240,000 which had been paid to them claiming that it constituted a trust fund for their benefit and which they were entitled to pursue and recover back.

In the second cause of action they sued the stockholders for double liability. M. C. Garber was made a defendant in this second cause of action and they sought to recover from him upon the theory that he had sold his stock within sixty days next before the date of the failure of the American National Bank to meet its obligations or with knowledge of such impending failure.

The third cause of action was against a part of those who had been directors of the American National Bank

claiming that they had violated their duties as such directors in disbursing this fund of $240,000 and paying the same back to the stockholders.

The case at bar was filed in the District Court of the United States for the Western District of Oklahoma on January 20, 1938, and after certain preliminary proceedings, had been had the further proceedings in the case were stayed by order of the court pending the determination by the Supreme Court of the State of Oklahoma of the appeal of the American National Bank in the original action. The judgment of the lower court was affirmed in that case by a bare majority of the court (191 Okla. 53, 126 Pac. 2d 733).

Subsequent to the final termination of that case this case was brought to trial in the lower court and was tried to the court without a jury and went to judgment on September 16, 1943 (See Record page 72). On the first cause of action judgment was rendered against all of the stockholders for the amount of money which had been returned to them representing their investment in the capital stock of the bank plus surplus.

On the second cause of action, which was for the purpose of enforcing the double liability of the stockholders under Pars. 63 and 64, Title 12, U. S. C. A., the court levied an assessment against the stockholders and rendered a personal judgment against all stockholders for $15.17 per share and retained jurisdiction as to all matters pertaining to the necessity of and the making and enforcement of additional assessments against shareholders and the liability therefor (See Record pages 74-82).

It was on this second cause of action that judgment was rendered against the petitioner, M. C. Garber (See Record, Paragraph 13, page 78). It was from this judgment that he appealed to the United States Circuit Court

of Appeals for the Tenth Circuit and which court on July 6, 1944, rendered its judgment affirming the judgment of the trial court against petitioner and rendered its opinion in said cause (See Record pages 119-120).

Petitioner, M. C. Garber, as well as other appellants in that action, filed a petition for rehearing in the Circuit Court of Appeals and on August 26, 1944, that court denied his petition for rehearing and filed an additional opinion as to him on rehearing (See Record page 131).

The third cause of action has gone out of the case. The trial court rendered judgment on that cause of action against those of the directors of the American National Bank who had been made defendants on that cause of action for $188,280 plus interest and costs. From that judgment, the directors prosecuted an appeal to the Circuit Court of Appeals and by which court that judgment was reversed with directions to dismiss such third cause of action and which reversal has become final.

Reference will be hereafter made to certain parts of the opinion of the Circuit Court of Appeals reversing the judgment on that cause of action as they are important as to the facts therein referred to and conclusions of law reached as bearing upon the determination by that court of the Appeal of petitioner, M. C. Garber, from the judgment rendered against him on the second cause of action.

After the sale of its business to the First National Bank and on December 20, 1929, the stockholders and directors of the American National Bank held meetings and by proper action for that purpose went into voluntary liquidation as provided by Par. 181, Title 12, U. S. C. A., elected a liquidating agent, fixed the amount of his bond and took all steps necessary for the orderly liquidation of the affairs of the bank (See Minutes of Meetings of Stockholders and Directors, pages 97-99 of Record), and proceeded thereafter with such liquidation and its business

and affairs had been wound up and practically completed during the period of nearly two years from the date it went into voluntary liquidation on December 20, 1929, and more than two years after it had sold its business to the First National Bank of Enid, on November 25, 1929, when the claim of the plaintiffs was first asserted by the filing of their action on December 14, 1931, against the American National Bank and certain of its directors, and in which action they subsequently recovered the judgment sought to be enforced in this action. (In some places in the Statements of Matters Stipulated and other places in the Record, the date of the filing of this suit is given as December 16, 1931, which is merely a clerical error and makes no difference, the correct date, however, being December 14, 1931.)

The sole ground upon which liability was asserted against the defendant, M. C. Garber, under the second cause of action, was predicated upon that part of Par. 64, Title 12, U. S. C. A., which provides that the stockholders in any National Banking Association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, etc.

It is the contention of petitioner that under the admitted and undisputed facts in this case that he is not liable under said section when properly interpreted, and for the purpose of placing before this court the pertinent facts pertaining thereto, the following is a summary thereof.

Keeping in mind that the American National Bank of Enid, sold its business to the First National Bank of Enid on November 25, 1929, and quit business as a bank, having

made ample provision for the payment of all of its known liabilities, and that M. C. Garber, appellant, sold all of his stock in the American National Bank in good faith to D. J. Oven on November 14, 1929, and that the original suit of the respondents was filed against the American National Bank and certain of its officers and directors on December 14, 1931, we quote the following from the Amended Petition of the plaintiffs in the original suit against the American National Bank and certain of its directors (See Record page 103):

> "(14) That none of the matters and things herein alleged and set forth respecting the embezzlement, misappropriation, conversion, etc., of said deposit and or of said 'Crews Estate Oil & Gas Producers, Escrow' account, funds, money, Liberty Bonds and or Treasury Certificates, accrued interest proceeds thereof, etc., or of the failure of said banks, and each of them, and their officers and directors, and each of them, to faithfully, honestly and diligently perform the duties incumbent upon them, were discovered by these plaintiffs, or any of them, until within approximately one year next preceding the commencement of this action, and these plaintiffs, and none of them, knew or had any knowledge or notice of the hereinbefore alleged fraudulent acts of said Farmers State Bank and its officers and directors, and said American National Bank, and its officers and directors, or of such fraudulent acts on the part of any of such officers and directors, or of such fraudulent acts on the part of the defendants, herein, or any of them, and did not know or discover the same until within approximately one year next preceding the commencement of this action, and that all the matters and things herein alleged respecting the aforementioned fraudulent conversion by the defendants, and each of them, and the aforementioned fraudulent misconduct and conversions, etc., of the officers and directors of said American National Bank, and the fraudulent miscon-

duct, conversions, etc., of the officers and directors of said Farmers State Bank, and each of them, to perform faithfully, diligently and honestly the duties of their office as such officers and directors, and of the fraudulent conversion and misappropriation of said 'Crews Estate Oil & Gas Producers, Escrow' account, funds, money, Liberty Bonds and or Treasury Certificates, accrued interest, proceeds thereof, etc., HAVE BEEN DISCOVERED BY THESE PLAINTIFFS WITHIN APPROXIMATELY ONE YEAR NEXT PRECEDING THE COMMENCEMENT OF THIS ACTION, AND SINCE OCTOBER 15, 1930, AND PRIOR TO SUCH TIME, AND UP UNTIL SUCH DISCOVERY, PLAINTIFFS, AND EACH OF THEM, AT ALL TIMES BELIEVED THAT THE AFFAIRS OF SAID BANKS WERE BEING HONESTLY ADMINISTERED AND THAT THE OFFICERS AND DIRECTORS OF SAID BANKS WERE FAITHFULLY, DILIGENTLY AND HONESTLY PERFORMING THEIR DUTIES AS SUCH and that the aforesaid deposit and 'Crews Estate Oil & Gas Producers, Escrow,' account, funds, money, Liberty Bonds and or Treasury Certificates, accrued interest proceeds thereof, etc., were being honestly administered, preserved and safely kept, and that same was intact and that same, and every part thereof, was available for delivery upon demand and could and would be delivered by said banks upon demand" (the emphasis is ours).

It is an agreed fact in this case that the American National Bank was, up to the date of November 25, 1929, when it sold its business, a solvent and going concern, leaving out of consideration, the claim thereafter asserted by the respondents by the filing of their action against the American National Bank and some of its directors on December 14, 1931. Also that there were no other creditors of the American National Bank than the respondents (See Statement of Matters Stipulated at page 30 of Record).

"(c) That there are no creditors of the American National Bank of Enid, other than the plaintiffs in this action."

The trial court in his findings of fact also made a finding to that effect (See Record page 54). The trial court also found (See Record page 53).

"10. Until November 25, 1929, the bank was a going concern and was believed by all the defendants here defending to be a solvent as well as a going concern."

In the trial court an Agreed Statement of Facts in writing was entered into between the parties to this action including a Stipulation of Facts as to the defendant (petitioner, M. C. Garber). It is found at Paragraph 15 of such Stipulation and is as follows (See Record pages 34-35):

Stipulation of Facts As to M. C. Garber.

"15. That on November 14, 1929, the defendant, M. C. Garber, for a valuable consideration sold and delivered to the defendant, D. J. Oven, his stock in the American National Bank of Enid, being 125 shares, and the certificate evidencing the same was duly endorsed by the said M. C. Garber and transferred to the said D. J. Oven; that such certificate was duly surrendered to the American National Bank of Enid, and a new certificate No. 100, for such 125 shares of stock was, on November 14, 1929, issued and delivered to the said D. J. Oven; that on November 14, 1929, and up to November 25, 1929, the date the American National Bank of Enid, sold its business and assets to the First National Bank of Enid, the American National Bank of Enid was a solvent and going concern, not taking into consideration and excluding the claim of the plaintiffs in this case, upon which they filed suit on December 16, 1931, and which claim was subsequently reduced to judgment in that action and

is the $249,000.00 judgment which is the basis of this action; that the circumstances of such sale of his stock by the said M. C. Garber to the said D. J. Oven were that a few days prior to November 14, 1929, the said D. J. Oven went to the said M. C. Garber and sought to purchase from him his stock in the American National Bank. That the said M. C. Garber thereupon told him that he would take the matter under consideration and advise him later. That a few days later the said D. J. Oven again saw the said M. C. Garber, and the said M. C. Garber advised him that he had considered the matter and concluded that if the said D. J. Oven would buy his stock in the American National Bank and also some stock which he owned in the American National Mortgage Company and the American Building Company so as to clean up his investment in all these companies, that he would sell provided that they could agree upon the price.

"That they thereupon did agree upon the price for the stock of the said M. C. Garber in the American National Bank and in the other companies mentioned, the total price for all being $25,625. That the sale was consummated on November 14, 1929, and the said D. J. Oven paid him for such stock by giving him a check for $825.00 and five promissory notes for $5,000.00 each due at intervals and which notes were paid before they became due in the month of December, 1929.

"That it shall be considered, that, subject to objection as to its competency, relevancy and materiality by plaintiffs, the defendant, M. C. Garber, testified that at the time of such negotiations and of the consummation of the sale of such stock by M. C. Garber to D. J. Oven, on November 14, 1929, the said M. C. Garber had no information to the effect that the American National Bank contemplated selling its assets and business to the First National Bank and going out of business, and that at such time the defendant, M. C. Garber, knew nothing of any claim by the plaintiffs against the American National Bank.

and believed the American National Bank to be fully solvent at such time, and had no knowledge of any impending failure of the American National Bank, and the sale of his stock by the said M. C. Garber was made in good faith and without any intention of trying to avoid liability as a stockholder in such bank."

In the Findings of Fact and Conclusions of Law made by the trial court, Paragraphs 14 and 15 (See Record pages 56-57) is the following:

"14. The defendant, M. C. Garber, at the solicitation of D. J. Oven (a defendant here), on November 14, 1929, sold the said D. J. Oven his entire holding of 125 shares of stock in the Bank, together with other stocks. The sale was consummated after several days consideration, the stock certificates regularly endorsed, delivered and surrendered for transfer, and a new certificate for the full amount thereof was issued and delivered to said D. J. Oven. The total consideration for the entire transaction was $25,625 which was paid in due course, and admittedly included a valuable consideration for the bank stock.

"15. The sale was made by Judge Garber, without any information on his part of any impending failure of the bank, or that it contemplated going out of business or selling its assets, and without any knowledge that the Crews heirs had a claim against the bank, and in the belief that the Bank was solvent. His claim of good faith is not disputed."

In the Findings of Fact and Conclusions of Law by the trial court, in Sub-Paragraph C-10 (See Record page 57) the court found as follows:

"Stockholder transferring stock within sixty-day period liable."

"C-10. Those who were stockholders and transferred their stock at any time within the sixty-day

period prior to November 26, 1929, are liable secondarily, regardless of whether the transfer was or was not made in good faith."

The American National Bank paid every creditor during its process of liquidation save and except the unknown and unasserted claim of respondents and which they claimed to have discovered more than one year after the sale of its business and assets by the American National Bank to the First National Bank of Enid on November 25, 1929, and to recover which they filed suit in the District Court of Garfield County, Oklahoma, against the bank and some of its directors on December 14, 1931.

Upon the foregoing state of facts, the trial court held that petitioner, M. C. Garber, was subject to the double liability provided by Par. 64, Title 12, U. S. C. A., and levied an assessment against the 125 shares of stock in the American National Bank which he had sold to D. J. Oven on November 14, 1929, and rendered judgment against petitioner for the amount of the assessment and retained jurisdiction to make further and additional assessments. This judgment was affirmed by the Circuit Court of Appeals and it is to reverse such judgment that petitioner comes to this court.

THE QUESTION PRESENTED.

Whether the petitioner as a former stockholder in the American National Bank of Enid, Oklahoma, is subject to assessment as a stockholder in said bank under the provisions of Par. 64, Title 12, U. S. C. A., he having made a *bona fide* sale of his stock for valuable consideration in good faith on November 14, 1929, more than sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure and where, at the time of such sale,

such bank was a solvent and going concern except for an undisclosed and unknown liability to a creditor which was not asserted until a suit was filed by such creditor on such claim more than one year subsequent to the sale by petitioner of his stock, and where such claim was unknown to the creditor filing such suit for more than a year after the sale of such stock and upon which claim the creditor recovered a judgment against such bank on October 29, 1937, nearly eight years after the sale by petitioner of his stock in said bank, and where it is an agreed fact in the case that except for such judgment subsequently recovered by such creditor, that the bank in question was a solvent and going concern and that there is no other creditor of said bank, and where the sale of such stock was made by petitioner in good faith and without any intention of trying to avoid liability as a stockholder in such bank.

ARGUMENT.

We contend that the interpretation placed by the Circuit Court of Appeals on that part of the language of Par. 64, Title 12, U. S. C. A., reading as follows:

> "The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer."

is erroneous and is in conflict with the applicable decisions of this court and other federal courts and of state courts and the interpretation so placed upon that part of Section 64 is not the correct or true meaning thereof.

The Circuit Court of Appeals in its original decision disposed of this question in the following language quoted therefrom (See Record pages 119-120).

> "INSOLVENCY OF THE BANK.
>
> "The American National Bank closed its doors as a banking institution on the evening of November 25, 1929. Thereafter it did no banking business. The $240,000 involved in this suit was distributed to the stockholders in December, 1929. After its distribution, the only asset the bank had was the right to receive an additional $100,000 from the First National Bank of Enid when the paper which it had guaranteed was paid, but its total liability on its guarantee of paper amounted to $138,591.48. In addition, it had outstanding appellees' claim of $249,000.
>
> "A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Sec. 21,

et seq., when it is unable to meet its obligations when they mature. While appellees' claim was contingent and unknown at the time the bank closed its doors, it must be considered in determining the solvency of the bank. It is quite obvious that the American National Bank was wholly unable at any time after it closed its doors on the evening of November 25, 1929, to meet its obligations and that its insolvency dates from that time. All stockholders, including appellant, M. C. Garber, in No. 2783, who transferred their stock within sixty days prior to November 26, 1929, were liable for the stock assessments even though the transfers were made in good faith."

In its opinion on Petition for Rehearing handed down on August 26, 1944, the Circuit Court of Appeals again considered this question and disposed of it in the following language, to-wit (See Record page 131):

"M. C. Garber, appellant in Number 2873, has filed a petition for rehearing in which he contends that we misinterpreted 12 U. S. C. A., Sec. 21 *et seq.*, as it affects the liability of one who transfers stock in a banking institution. It is contended that we established the date on which it was determined that the bank was insolvent in the sense that its liabilities exceeded its assets rather than the date on which the bank failed to meet its obligations when they matured as the date which determines the liability of one transferring stock. With this we cannot agree. We agree that it is the date on which a bank fails to meet its obligations that determines the liability of one transferring his stock. It is true that the word 'insolvency' is not used in the applicable statute. The opinion could well have omitted the use of the word 'insolvency.' However, there can be no question as to the sense in which we used the term. We defined insolvency for the purpose of determining the liability of one transferring stock as being the failure of a bank to meet its obligations when they mature. We said: 'A national bank is insolvent within the

meaning of the National Bank Act, 12 U. S. C. A., Sec. 21 *et seq.*, when it is unable to meet its obligations when they mature.' Inability to meet its obligations is the test which establishes the liability of one transferring stock. We do not understand the law to require that a claim be actually presented for payment and that payment be refused before liability attaches. We know of no case holding to that effect. Certainly the case of *Brown* v. *Rosenbaum*, 41 N. E. 2d 77, upon which appellant relies, does not so hold. It holds that where a bank is closed and a conservator is appointed, the day on which the bank was closed may determine both the date on which the rights of creditors and the liabilities of stockholders attach. In *People* v. *Merchants' Trust Co.*, 79 N. E. 1004, it was held that the appointment of a temporary receiver and the taking of assets by him operated to prevent the defendant from paying the claims of creditors and therefore obviated the necessity of a formal demand for payment. In *Broderick* v. *Aaron*, (N. Y.) 197 N. E. 274, 103 A. L. R. 684, the superintendent of banks took possession of a bank on December 11, 1930. It did not appear that on that date the bank was actually insolvent. The court held that 'none the less the closing of the bank occasioned an automatic default in the payment of its debts and liabilities.'

"Garber sold his stock November 14, 1929. The bank disposed of its business and closed its doors November 25, 1929, and did not function as a banking institution thereafter. It went into voluntary liquidation and appointed a liquidating agent December 20, 1929. The directors distributed the $240,000 received from the First National Bank of Enid some time in December, 1929, to the stockholders of record as of November 25. Thereafter the bank had not a single dollar with which to meet any claim. Its doors were closed and it had ceased to function as a banking institution. The presentation of a claim for payment after that would have been a mere formality. By this course of conduct the bank automatically disqualified

itself from meeting any of its obligations. To hold that it was still necessary that a claim be presented and dishonored before a stockholder's liability attached would be adopting a strained construction, entirely out of line with the purpose sought to be accomplished by the statute.

"The petition for rehearing is Denied."

We contend that this additional opinion by the Circuit Court of Appeals is likewise an erroneous interpretation of the federal statute in question and in conflict with the applicable decisions of this Court and other federal courts and state courts.

We likewise contend that under the undisputed facts in this case there is no liability on the part of petitioner under Par. 64, Title 12, U. S. C. A., for an assessment against stock which he had sold to D. J. Oven on November 14, 1929.

The American National Bank never did fail as a bank; there was no failure on its part to meet its obligations within sixty days from November 14, 1929, the date when M. C. Garber sold his stock to D. J. Oven. The bank sold its assets and business to the First National Bank of Enid, Oklahoma, on November 25, 1929, and the purchasing bank assumed responsibility for its deposits and all of its known obligations. The claim of the plaintiffs (respondents) was not asserted until they filed their suit against the American National Bank on December 14, 1931. They did not know that they had any such claim until within a year prior to the filing of their suit. In the meantime, the American National Bank was voluntarily liquidated. No receiver or conservator was ever appointed for it. Upon closing out its business it refunded to the stockholders their investment in the capital stock and surplus of the bank, no part of which was received by M. C. Garber, and no claim was made against him on the first cause of action.

He is only interested in the claim asserted in the second cause of action under the double liability provisions of Section 64.

We have heretofore quoted the decision of the Circuit Court of Appeals disposing of this question both in its original opinion and on rehearing.

Not a suggestion can be found in the record of any obligation or claim which the American National Bank failed to meet within sixty days after November 14, 1929, the date of the sale of his stock by petitioner, nor for a much longer period, the fact being as found by the lower court that there is no other creditor than the plaintiffs (respondents) in this case.

This is an established and admitted fact in this case which was recognized by the Circuit Court of Appeals in its opinion in disposing of the appeal of certain directors from the personal judgment rendered against them upon the third cause of action and which judgment was reversed by the Circuit Court of Appeals with instructions to dismiss such cause of action.

In that part of the opinion and referring to the liquidation of the bank, the court had first referred to the Statute, 12 U. S. C. A., Par. 182, making it the duty of directors of a bank which had gone into voluntary liquidation to publish a notice to creditors for a period of two months in a newspaper published in the City of New York, and also in a newspaper published in the City or Town in which the bank is located and which notice was published in both places by the directors, but which notice was not published until after the payment back to the stockholders of the $240,000, the court said (See Record page 118):

> "Every known claim had been paid and satisfied. No one connected with the liquidation of the bank had any reason to believe that there existed any pos-

sible claim against these funds. Under these circumstances we do not believe it can be said that there was a violation of their common law duty to exercise reasonable care in paying this money to the stockholders.

"But even if it be said that they were negligent in the disbursement of this money, still they are not personally liable. They are liable only for such loss as proximately results from their negligence. The mere fact that the directors do not know of the existence of a claim does not relieve them from failure to publish the notice. One purpose of the notice is to permit those who have claims of which the bank has no knowledge to present them and call them to the attention of the officers. *But here the appellees themselves did not know at that time that they had a claim against the American National Bank. They did not know it for considerably more than a year after the bank ceased doing business and went into liquidation.* It must then be conceded that had this notice been published, this claim would not and could not have been presented. It follows that the failure of the appellees to reach this fund of $240,000 in the hands of the liquidating agent was not the proximate result of any claimed negligence on the part of the directors. Nothing that could have been done in the course of an orderly, timely liquidation would have made the fund available for the satisfaction of a claim *the existence of which was unknown to any of the parties to this litigation for more than a year after the liquidation was undertaken.*"

In disposing of the question of laches which had been raised as to the first and third causes of action, the Circuit Court of Appeals further said (See Record page 114):

"These equitable considerations are especially applicable to this case. Appellants were only secondarily liable. Their duty to respond depended upon the ability of appellees to obtain a money judgment against the American National Bank. Appellees' claim was an unliquidated demand founded in a tort of a very controversial nature, as is evidenced by the fact

that the judgment was sustained by the Supreme Court by a bare majority."

In order that the court may have Section 64 before it, we copy it and it is as follows:

> "64. Individual Liability of Shareholders: transfer of shares.
>
> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure (Dec. 23, 1913, Ch. 6, Sec. 23, 38 Stat. 273)."

The statute under which the plaintiff's (respondents) seek to fasten liability on M. C. Garber, was passed for the purpose of preventing stockholders in a bank which was about to fail or who had knowledge of its impending failure from transferring their stock to irresponsible persons and thereby evading liability to the creditors of the failing bank and holding the stockholder liable if he made such a sale within such period of time.

The Circuit Court of Appeals fell into an error in interpreting the part of Section 64 in question and in holding that a stockholder who had sold his stock was liable under the double liability provision if such bank was in-

solvent at time of such sale notwithstanding the fact that it was a going concern and continued to be for more than sixty days after such sale and in holding that the judgment recovered by the plaintiffs (respondents) against the bank on October 29, 1937, was retroactive and rendered the bank insolvent on November 25, 1929, the date when it sold its business and assets and that it was unable to pay its obligations and therefore had failed to meet its obligations on that date on account of the adjudication of the claim of plaintiffs (respondents) nearly eight years thereafter.

Such interpretation we contend, is clearly in conflict with the former decisions of this court, other federal courts and state courts.

The statute in question does not in words prohibit the sale of stock when a bank is insolvent as insolvency is properly defined and interpreted by the decisions of this court, but only creates such liability where the stock is sold within sixty days next before the failure of the association to meet its obligations or with knowledge of such impending failure.

Even if the word insolvent had been used, it would not justify the finding of the trial court in this case or the decision of the Circuit Court of Appeals that the American National Bank was insolvent on November 14, 1929, and on November 26, 1929, the day after it ceased to do business. The court found that the bank was solvent at those times excluding the claim of the Crews heirs and could only find that the bank was insolvent upon the theory that the judgment obtained by them on October 29, 1937, was retroactive for the purpose of determining not only the solvency of the bank but that the bank had failed to meet its obligations within 60 days after November 14, 1929, which we contend is not the law and cannot be true under the situation in this case.

One of the land-marks in the adjudicated cases on this question is *Earle* v. *Carson*, 187 U. S. 42, 47 L. Ed. 373, in which the opinion was written by Mr. Justice White, and while it is true that this case was decided prior to the adoption of the amended Section 64, nevertheless the rules of construction laid down in this decision are just as applicable to the amended statute as to the original Section 63.

In the opinion in this case, the court uses the following language:

> "The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it develops that the bank was insolvent at the time of transfer in the sense that its assets were then unequal to the discharge of its liabilities when such fact was unknown to the seller of the stock at the time of the sale."

Further on in this opinion in discussing the question of what is meant by the term "insolvency" of a bank, this court clarifies that expression by the following language:

> "The error of the argument arises from the fact that it affixes to the word 'insolvency' as found in the sentences quoted, the erroneous import hitherto pointed out; that is, an inadequacy of the assets of a bank to pay its liabilities, instead of giving to it its true meaning, that of failure and consequent suspension of business."

In other places in the opinion in this case, this court stated as follows:

> "It is undisputed that at the date when the stock was sold the doors of the bank were open, and it had not failed in business. Hence, the proposition is this: Although a national bank has not suspended payment, all sales of its stock, whatever may be the good faith

with which they are made, are void if it develops that at the date of the sale the assets of the bank, if they had been then realized on, would have been insufficient to pay its debts. The proposition is supported by what is assumed to be the essential nature of the double liability of a stockholder in a national bank and the time when such liability, by operation of law, becomes irrevocably fixed. Passing for a moment an analysis of the premises upon which the argument proceeds, let us determine the result to which it necessarily leads. Proceeding to do so, it becomes clear that the effect of maintaining the argument would be to virtually prevent the exercise of the power to transfer stock 'like other personal property,' which the statute gives in express terms. Rev. Stat. 5139, U. S. Comp. Stat. 1901, p. 3461. That such would be the result if the validity of every sale of stock depended, not upon the good faith of the seller, but upon the condition of the bank as subsequently developed is, we think, obvious. Certainly, it cannot in reason be said that the power would exist to sell stock like any other personal property if, before the power could be exercised, the seller must examine the affairs of the bank, marshal its assets and liabilities in order to form an accurate judgment as to the precise condition of the bank. But it has long since been pointed out (*First Nat. Bank* v. *Lanier*, 11 Wall. 377, 20 L. Ed. 174) that—

> 'The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is not less the interest of the shareholder than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

'It is in obedience to this requirement that stock certificates of all kinds have been construed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable.'

* * * * * * *

"If the proposition were sustained it would thus come to pass that the power of stockholders to freely transfer their stock like any other personal property would be burdened with a restriction arising from the unknown insolvency of the bank, while such limitation would not apply to any other contract concerning the property or affairs of the bank. This would be to hold that the statute had conferred the lesser freedom of contract where it was its avowed purpose to give the greater. It would, besides, require us to say that a limitation resulting from unknown insolvency was made effective upon a stockholder in transferring his stock, when such restriction was not made operative on the bank and its officers when they entered into contracts. But this would cause the unknown insolvency to restrict the power of the person less likely to be aware of its existence, and to cause it not to be controlling where knowledge was most apt to obtain. Taking into view the whole act—the provision conferring the power to transfer stock; the one already referred to, which avoids contracts made in contemplation of insolvency; the authority conferred upon the Comptroller to constantly test the condition of a national bank; the right given him to suspend the business of such bank when the exigencies of its situation require it; and the double liability imposed on the registered stockholders—we think it results that the power to transfer stock, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern,

was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the fact, and had sold his stock to avoid the double liability which was impending."

This case of *Earle* v. *Carson* is so important and the law as therein enunciated so applicable to the situation under consideration in the case at bar, that we felt impelled to copy the foregoing extracts therefrom and in addition thereto, we refer to the entire opinion in the case and adopt the same as a part of this brief.

It is referred to and reaffirmed in the case of *McDonald, Receiver,* v. *Dewey et al.*, 202 U. S. 510, 50 L. Ed. 1128. From this case we take the following:

" 'Certainly,' said Mr. Justice White in the opinion (p. 46, L. Ed., p. 376, Sup. Ct. Rep., p. 256), 'it cannot in reason be said that the power would exist to sell stock like any other personal property, if, before the power could be exercised, the seller must examine the affairs of the bank, marshal its assets and liabilities, in order to form an accurate judgment as to the precise condition of the bank.'

"In discussing the question in regard to the validity of the transfer, it was said (p. 49, L. Ed., p. 377, Sup. Ct. Rep., p. 257) that 'the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that, where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it developed that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale.' "

* * * * * * *

"1. We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling with notice of the insolvency of the bank, and with intent to evade the double liability imposed upon the stockholder by the national banking act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. This was practically the ruling in *Earle* v. *Carson*, in which we held that a *bona fide* sale would not be void, though the vendee were insolvent, if the fact of such insolvency were at the time unknown to the seller. The case of *Earle* v. *Carson*, so far from lending countenance to the argument of the appellees, bears strongly in the opposite direction."

We next call attention to the case of *Hodges* v. *Meriweather*, (C. C. A. 8) 55 F. 2d 29. This is a case decided under the provisions of Section 64. The third paragraph of the syllabus reads as follows:

"3. Banks and Banking 249 (1).

"Stockholder, transferring shares *bona fide* over 60 days from bank's failure, without knowing or having reason to believe that bank is insolvent, is not subject to stockholder's liability (12 U. S. C. A., Sec. 64)."

We next refer to the case of *Fowler* v. *Crouse et al.*, (C. C. A.) 175 Fed. 646, the first paragraph of the syllabus reads as follows:

"1. Banks and Banking (Section 249)—National Banks—Double liability of stockholders—Transfer of stock.

"A Stockholder in a national bank divests himself of the double liability imposed by the statute for the protection of creditors by a transfer of his stock when the bank is solvent, or even if insolvent, by a *bona fide* transfer without knowledge of the insolvency; the only ground for holding him liable after a transfer being fraud."

If the American National Bank had not sold its business on November 25, 1929, there would have been no failure on its part to meet its obligations within sixty days from the date of such sale because it was a going concern and solvent except for the undisclosed, unasserted claim of the Crews heirs, and every other obligation that it had was fully paid and satisfied which is an admitted and established fact in this case and there was no other creditor than the Crews heirs and even they did not know that they had such a claim until more than a year after the sale of the bank. Therefore, having no knowledge that they had a claim against the bank they could not have presented it or made demand upon it or asserted it within sixty days from the sale of the bank and the bank could not have failed to pay a claim about which no one knew and as was said by the Circuit Court of Appeals in reversing the judgment against the directors,

"No one connected with the liquidation of the bank had any reason to believe that there existed any possible claim against these funds" (See Record page 118).

In January, 1930, the directors of the bank published the statutory notice in an Enid newspaper, which notice was published for eight consecutive weeks, the first publication being on February 6, 1930, and the last on March 27,

1930, together with a companion notice by the First National Bank of Enid stating that it had succeeded the American National Bank of Enid by the purchase of its assets and had assumed the payment of its liabilities (See Record pages 101-102).

The trial court held that this notice did not conform to the statutory requirements because it was not published for two calendar months, whereas it was published for eight consecutive weeks, which fell a little short of the two full months, but the fact remains that these notices were published and for all practical purposes had the same effect as if published for the two full months.

The plain fact of the matter is as disclosed by the record in this case, that the sale of the American National Bank to the First National Bank of Enid on November 25, 1929, was a perfectly legitimate and *bona fide* transaction and in which deal the First National Bank paid a liberal bonus for the business of the American National Bank which was a solvent and going concern, and that prior to this sale on November 14, 1929, the petitioner, M. C. Garber, had made an actual, *bona fide* sale of his stock in the American National Bank to D. J. Oven who was one of its directors and at which time the petitioner did not even know of the proposed sale of the bank and made such sale without any intention of avoiding liability as a stockholder and sold his stock because Oven solicited him to sell it and they finally agreed on terms and Judge Garber did sell it without the slightest intimation that a claim would be asserted by the respondents against the American National Bank more than two years later. Certainly it was never intended that under such a set of circumstances as these the petitioner should be liable for a double assessment on his stock due to the fact that more than two years after he sold it a suit was filed against the bank and six years later a judgment was rendered in that case against

the bank, and which judgment was for unliquidated damages based upon a tort of a very controversial nature as stated by the Circuit Court of Appeals in its opinion.

The exact question involved in this case has been passed upon in the case of *Brown* v. *Rosenbaum,* (Court of Appeals of New York) 287 N. Y. 510, 41 N. E. 2d 77. Certiorari denied by the United States Supreme Court May 25, 1942; 62 S. Ct. 1282, 86 L. Ed. 1760. This case interprets the provisions of Section 64 and as to what is meant by the language "failure of such association to meet its obligations or with knowledge of such impending failure," and if the law is as stated in this decision, which has been approved by this court by the refusal to grant Certiorari, then there is no question but what this judgment against M. C. Garber must be reversed. We adopt the following extract from that case as a part of our argument. The first head-note in the above entitled case reads as follows:

> "1. Banks and Banking 248(1).
>
> "A bank has not failed to meet its obligations within statute imposing liability on stockholders of national bank which fails to meet its obligations, so long as the bank pays its obligations at the time and place they are payable."

From the opinion, which we ask the court to read in full, we extract the following:

> "(1) It is clear that a bank has not failed to meet its obligations within the meaning of the statute so long as it pays its obligations at the time and place its obligations are payable. While all banks remained closed by command of the government, the date when payment of the obligations of each and all banks became due and could be demanded was postponed. Certainly no solvent bank which resumed business and paid its obligations when permitted by the government was

in default in any payment for which it would have been liable in the interval if the date for payment had not been postponed. The appellant, of course, does not claim otherwise. His claim is that where a bank was insolvent at the time it was closed by governmental authority and for that reason was not thereafter permitted to reopen, the date on which it was compelled to close under proclamation of the President or of the Governor fixes the time when rights of creditors and the responsibility of stockholders for the debts of the bank became fixed.

"Under the National Banking Act the right of creditors against a national bank attach when an 'act of insolvency' is committed. See U. S. Code, Title 12, Sec. 91, 12 U. S. C. A., Sec. 91. The directors have no power after that date to change or defeat such rights by preferential payments or other devices. Under ordinary circumstances the date of insolvency is fixed when the assets of a bank are surrendered by its directors to the Comptroller for administration or when the Comptroller exercises administrative authority to conserve or liquidate bank assets. During the banking holiday when all banks were closed by governmental authority and payment of any banking obligations was prohibited, there was no occasion for the Comptroller to take possession of the assets of an insolvent banking association in order to conserve them or to prohibit the insolvent banking association from continuing to conduct its banking business. When an insolvent bank was denied permission to reopen for regular business after the end of the banking holiday, though solvent banks then resumed their usual banking operations, the date when the right of creditors attached was properly fixed at the time when 'the facts indicated that the bank would not be able to pay its depositors in due course' though at that time the banking holiday was not completely at an end. *Downey* v. *City of Yonkers*, 2 Cir., 106 F. 2d 69, 74, affirmed 309 U. S. 590, 60 S. Ct. 796, 84 L. Ed. 964. See also, *Bryce* v. *National City*

Bank of New Rochelle, (D. C.) 17 F. Supp. 792, affirmed 2 Cir., 93 F. 2d 300.

"Congress has not, however provided that the liability of stockholders like the rights of creditors against an insolvent bank, attaches at the date of an 'act of insolvency.' Congress has expressly provided that liability of stockholders of an insolvent banking association attaches and becomes fixed upon 'the date of the failure of such association to meet its obligations.' The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; *the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches. Often, perhaps usually, the dates will coincide—not always"* (Emphasis ours).

In its opinion on the Petition for Rehearing, in this case (See Record page 132), the Circuit Court of Appeals referred to the case of *Brown* v. *Rosenbaum,* from which we have heretofore quoted, and said among other things:

"We defined insolvency for the purpose of determining the liability of one transferring stock as being the failure of a bank to meet its obligations when they mature. We said: 'A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Par. 21, *et seq.,* when it is unable to meet its obligations when they mature.' Inability to meet its obligations is the test which establishes the liability of one transferring stock. We do not understand the law to require that a claim be actually presented for payment and that payment be refused before liability attaches. We know of no case holding to that effect. Certainly the case of *Brown* v. *Rosenbaum,* 41 N. E. 2d 77, upon which appellant relies, does not so hold. It holds that where a bank is closed and a conservator

is appointed the date on which the bank is closed may determine both the date on which the rights of creditors and the liabilities of stockholders attach."

A reference to the case of *Brown* v. *Rosenbaum* will show that what the court said in that respect is as follows:

> "(2, 3) Where, while other banks remain open, a bank is closed or is placed upon a restricted basis or is prohibited or prevented from paying its debts as they become due in order to conserve its assets pending determination whether it is insolvent or whether its capital has been impaired and if impaired whether the impairment can be corrected, there is a 'failure' of the bank 'to meet its obligations.' In such case the closing of the bank may determine both the date when the rights of creditors and the liability of stockholders attach. That is true even though at that time it is hoped that the closing may be only temporary."

Certainly where a bank is closed by either state or federal authorities and a conservator is appointed to take charge of its business and affairs and which precludes it from meeting its obligations as they mature, that would constitute a failure of the bank to meet its obligations as provided by Paragraph 64 as to obligations which were known and ascertainable, and which would otherwise have been paid in the ordinary course of business save for the involuntary closing of such bank by authorities, but such is not the fact in this case and nothing can be found in the *Brown* v. *Rosenbaum* case, which in any way modifies the interpretation which we have placed upon it.

Reference was also made by the Circuit Court of Appeals in its opinion, to the case of *Broderick* v. *Aaron,* (N. Y.) 197 N. E. 274, and referring to that case, said:

> "The Superintendent of Banks took possession of the bank on December 11, 1930. It did not appear

that on that date the bank was actually insolvent. The Court held that 'none the less the closing of the bank occasioned an automatic default in the payment of its debts and liabilities.' "

An examination of that case reveals that the Superintendent of Banks of the State of New York took possession of the Bank of the United States on December 11, 1930. That thereafter and on December 26, 1930, one of the parties to that suit acquired certain shares of stock of the closed bank and the suit was brought by the Superintendent of Banks against such parties seeking to enforce liability as a stockholder against such purchaser who had acquired the stock after the taking over of the bank by the Superintendent of Banks.

The court, in stating the proposition involved in the case, said as follows:

> "The question presented upon this appeal is whether a person who acquired stock in a banking corporation after the Superintendent of Banks has taken possession of its business and assets is subject to the liability imposed by law upon stockholders of a bank."

It was in connection with the disposition of that question that the Court of Appeals of New York stated in its opinion that it did not appear that on December 11, 1930, when the Superintendent of Banks took possession of the business of the Bank of the United States or on December 26th, when the appellant acquired his stock, that the bank was actually insolvent. Then the court said:

> "None the less, the closing of the bank occasioned an automatic default in the payment of its debts and liabilities."

This was bound to be true because the bank was taken over by the Superintendent of Banks and closed and it no longer continued to conduct the business of a bank.

Then, further on in the opinion, the court said:

> "We fail to find in the law any indication of intent to hold responsible for the debts and liabilities of a bank those who acquired stock in a banking corporation after it had ceased to do business as a bank under a mandate of the state. Until then, the responsibility could be shifted from one person to another by a transfer of stock."

Thus it will be seen that this decision not only does not sustain the opinion of the Circuit Court of Appeals, but supports our contention.

No one will contend but what, when a bank is taken over and closed by the representatives either of a state or the Federal Government, this suspends its activities as a bank and operates to create a default in the payment of obligations of the bank from that date forward, but that is not the case at bar where an entirely different state of facts is involved.

The Circuit Court of Appeals, in its opinion on the petition for Rehearing, referred to the case of *People* v. *Merchants' Trust Co.*, 79 N. E. 1004, as a supporting authority for the conclusions reached by it.

An examination of that case reveals that it has no applicability to the case at bar. That case was an action instituted by the Attorney General of the State of New York against the Merchants' Trust Co., a banking corporation, in which judgment was demanded that the corporation be dissolved and its assets distributed upon the ground that it had become insolvent and its capital stock impaired.

On May 23rd, the day the suit was filed, a temporary receiver was appointed to take possession of the assets of the defendant, and on June 24, 1905, a final judgment was rendered dissolving the corporation and appointing permanent receivers to wind up its affairs.

The receivers in that case did take charge of the assets of the banking corporation and proceeded to wind up its business and affairs and the court, in that case, held that the appointment of the temporary receiver and the taking possession of the assets of the bank by him operated to prevent the bank from paying the claims of its creditors and thereby obviated the necessity of a formal demand for payment on their part.

No such situation existed in the case at bar for the American National Bank was never closed by any governmental authority nor any receiver appointed for its assets but on the contrary, it voluntarily sold its business and assets to the First National Bank of Enid, which assumed all of its known obligations and paid it a large amount of money for its business and assets and every known obligation that it had was discharged in full and it was more than two years thereafter when the plaintiffs in this case first asserted their claim against the American National Bank by filing their action against it on December 14, 1931.

Both the trial court and the Circuit Court of Appeals select the date of November 26, 1929, the day after the sale of its business by the American National Bank to the First National Bank as the date from which to reckon back the sixty day period during which time the sale of his stock by a stockholder left him still subject to the double liability and which, of course, is an erroneous conclusion.

It is an admitted fact in this case that the American National Bank was a solvent and going concern up to the date of November 25, 1929, save and except for the unknown and undisclosed claim of the plaintiffs upon which they filed suit more than two years thereafter.

Not only does that presumption of solvency continue, but it is also an admitted fact that there was and is no other creditor of the bank save the plaintiffs.

Neither does the fact that the bank went into voluntary liquidation give rise to any inference or presumption of insolvency.

This court has repeatedly decided that a cause of action based upon a tort is not a debt in the ordinary sense of the word (See *Chase* v. *Curtis*, 113 U. S. 452, 28 L. Ed. 1038), in which this court, in the opinion, used the following language:

> "Damage arising upon tort is not a debt accrued, within any reasonable construction of that term. It is apparent, as well from a view of the whole section as from an analysis of its parts, that the intent of the framers of it was only to make the stockholders individually responsible for the debts of the company."

Even the Circuit Court of Appeals in disposing of the question of laches in its opinion in this case (See record page 112), used the following language:

> "The general rule is that where a claim is for unliquidated damages or for a simple contract debt, a creditor may not maintain a creditor's bill in equity until he has reduced his claim to a judgment in a court of law."

The Circuit Court of Appeals referred to the decision of this court in *Swan Land & Cattle Company* v. *Frank*, 148 U. S. 603, and said:

> "The corporation there had distributed all its assets to its stockholders and had ceased doing business. The Supreme Court held that a creditor who had an unliquidated claim against the corporation could not maintain an action in the nature of a creditor's bill against the stockholders who had received the assets to subject them to the satisfaction of their claim, without first having reduced the claim against the corporation to judgment. The court said:

> 'We are also clearly of opinion that the court below was correct in sustaining the demurrer to the bill upon the other ground assigned, that the complainant had not previously reduced its demand against the vendor corporations to judgment. That claim was purely legal, involving a trial at law before a jury. Until reduced to judgment at law, it could not be made the basis of relief in equity.' "

The liability sought to be enforced against the petitioner in this case must be found in the statute, otherwise it does not exist. It was unknown at common law and is in derogation of common law and unless, under a proper interpretation of Paragraph 64 applied to the admitted facts in this case, the liability of the petitioner is fixed, it does not exist.

In the case of *Hamilton* v. *Offutt et al.*, 78 F. 2d 735, the second head-note reads:

> "Statute imposing double liability on shareholders of bank is in derogation of common law and cannot be extended beyond words used."

This rule is announced in the opinion in the following language:

> "In the view we take of the question, it should be answered in the affirmative only in the event the statute which it is claimed creates it is clear and unambiguous, for the double liability of the shareholders of a corporation depends on the terms of the statute creating it; and as such a statute is in derogation of the common law, it cannot be extended beyond the words used. *Brunswick T. Co.* v. *National Bank*, 192 U. S. 386, 24 S. Ct. 314, 48 L. Ed. 491."

In the case of *Brunswick Terminal Company* v. *National Bank*, 192 U. S. 386, 48 L. Ed. 491, the court lays

down the following rule in the opinion by Chief Justice Fuller:

> "This additional liability of a stockholder depends on the terms of the statute creating it and as it is in derogation of the common law, the statute cannot be extended beyond the words used."

This rule has been announced so many times that further citation of authorities is unnecessary.

In its original opinion under the heading "Insolvency of the Bank" (See Record.....) in which the Circuit Court of Appeals held that the American National Bank should be considered insolvent on November 25, 1929, by reason of the retroactive effect of the judgment obtained by the respondents against the bank in 1937, and which conclusion we have heretofore pointed out, is in direct conflict with the decisions of this court, the Circuit Court of Appeals, in foot-notes Nos. 17 and 18, cited three cases in support of its conclusion, but which, in our opinion, entirely fail to lend any support thereto and we will briefly refer to the same.

The first case referred to is *Smith* v. *Witherow*, 102 F. 2d 638, which was a suit by the Receiver of a national bank against the executors of the estate of a deceased stockholder to recover an assessment levied by the Comptroller of the Currency. No question of liability of a stockholder after sale of his stock is involved in this case, other questions being involved, and various defenses being made to the enforcement of the assessment including the contention that the taking over of the bank while solvent by the Government through the appointment of a conservator and its operation by that official at a loss deprived them of their property without due process of law and thereby released them from their liability to pay the stock assessment.

The case involved the question as to whether or not the condition of the bank justified the appointment of a conservator, etc.; in connection with which it appears that on February 18, 1933, a financial panic prevailed, but after banking hours on that day the Federal Reserve Bank of Philadelphia demanded payment by the bank in question of certain items which became due on the following business day. The demand was refused, and the run on the following business day became a certainty. Thereupon the directors of the bank adopted a resolution restricting the withdrawal of deposits and its doors were never thereafter re-opened for the payment of deposits in ordinary course.

Thereafter, a conservator was appointed for the bank who continued in possession until January 23, 1934, when a receiver was appointed.

It thus appears that in that case the bank failed to meet its obligations from and after February 18, 1933, and never thereafter was able to meet them. There is nothing in that case which lends any support whatever to the conclusion of the Circuit Court of Appeals.

The next case cited is *Aycock* v. *Bradley,* 77 F. 2d, 14. This was an action by the receiver of a national bank against a former depositor of the bank to recover certain preferential payments which had been made to him during the last business day preceding its suspension of business. There was no question under the facts related in that case but what the bank was insolvent the day before it suspended business and on which day it permitted one of its stockholders to take from the note case of the bank certain warrants and promissory notes and pay for them with a check against his account in the bank, which was clearly a preferential payment, after the bank had committed an act of insolvency and such transfer was made in contemplation of insolvency with a view to creating a preference.

There is no analogy between that case and the case at bar.

The next case cited is *Kullman & Co.* v. *Woolley*, 83 F. 2d 129. This is another case involving a preferential payment to a depositor while the bank was on a restricted basis during the banking holidays and in the course of the opinion in that case the court used the following language:

> "The bank statute voids 'payments of money to either (shareholder or creditor) made after the commission of an act of insolvency or in contemplation thereof.' In the much-quoted case of *Roberts* v. *Hill*, (C. C.) 24 Fed. 571, 573, these terms are well interpreted thus: 'Insolvency, as ordinarily defined, is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of his business. *Thompson* v. *Thompson*, 4 Cush. (Mass.) 127; *Vennard* v. *McConnell*, 11 Allen (Mass.) 555; *Wager* v. *Hall*, 16 Wall. 584, 599 (21 L. Ed. 504). An act of insolvency takes place when this state of affairs is demonstrated and the merchant has *actually failed* to meet some of his obligations. A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations."

This case likewise furnishes no support for the conclusion of the Circuit Court of Appeals in this case.

The last case cited in the foot-note at the bottom of the page is *Scott* v. *Commissioner*, 117 F. 2d 36. This is the case cited by the Circuit Court of Appeals in support of that paragraph of its opinion which reads as follows:

> "While appellees' claim was contingent and unknown at the time the bank closed its doors, it must

be considered in determining the solvency of the bank."

Now, turning to *Scott* v. *Commissioner*, the only case cited in support thereof, we find that the suit was one against certain parties as transferees of certain assets of a corporation to hold them liable for a deficiency to the extent of the value of the property of the corporation received by them. The question involved was the liability of these transferees for a deficiency in the income tax liability of the corporation determined after the transfer.

The fourth head-note of this case reads as follows:

"4. Internal revenue Key No. 1738.

"In determining question of corporation's insolvency on issue of liability of distributees of corporation's assets for corporation's taxes under the statute, a liability for taxes, though unknown at the time, must be considered. Revenue Act, 1928, Section 311, 28 U. S. C. A., Int. Rev. Code, Sec. 311."

In the opinion the court says as follows:

"At the time of the transfer the entire amount of the tax against the corporation had not been assessed, but there was an added tax later determined. We have held that a subsequently levied tax is nevertheless a potential liability of the corporation, of which the stockholders are charged with notice. *United States* v. *Armstrong*, 8 Cir., 26 F. 2d 227; *Updike* v. *United States*, 8 Cir., 8 F. 2d 913. In determining the question of insolvency, a liability for taxes, though unknown at the time, must be considered. *Commissioner of Internal Revenue* v. *Keller*, 7 Cir., 59 F. 2d 499."

The defendants in that action were stockholders of the bank to whom assets of the bank had been distributed without taking care of this deficiency tax subsequently ascertained.

A liability for taxes occupies an entirely different status from that of an unasserted, unknown claim of an ordinary creditor and especially of the claim of one based upon a tort which does not take the status of a debt until reduced to a judgment.

In our opinion the authorities cited by the Circuit Court of Appeals entirely fail to furnish any support for their conclusion.

CONCLUSION.

For all of the foregoing reasons, we submit that the judgment of the trial court against the petitioner, M. C. Garber, was erroneous and that the judgment of the Circuit Court of Appeals, affirming the same, was likewise erroneous and we, therefore, request that such judgments be reversed and that the cause be remanded with directions to enter judgment in favor of the petitioner.

All of which is respectfully submitted.

P. C. SIMONS,

Attorney for Petitioner.

FILE COPY

No. 518

In the Supreme Court of the United States

October Term, 1944.

M. C. GARBER, *Petitioner,*

vs.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, *NEE* CREWS, AND MARY WILLIS, *NEE* CREWS, *Respondents.*

BRIEF of RESPONDENTS.

L. G. OWEN,
Tulsa, Oklahoma,
Attorney for Respondents.

CHRISTY RUSSELL,
Mattoon, Illinois,

M. F. PRIEBE,
Enid, Oklahoma,
Of Counsel.

INDEX.

PAGE

Respondents' statement of the case 1

Question presented for decision in this court..... 5

Summary of points to be discussed..... 6

Argument 8

Point 1: A creditor of a national bank which has closed and ceased to carry on a banking business, who thereafter establishes his claim by suit and judgment, establishes such claim as of the date the bank closed.. 8

Point 2: The liability of stockholders in a national bank is fixed and determined as of the date it ceases to carry on a banking business, and this includes the liability imposed by Section 64, Title 12, U. S. C. A. 9

Point 3: Cases relied on by petitioner, distinguished 13

Conclusion 18

Table of Cases

American National Bank of Enid v. Crews, 191 Okl. 53, 126 P. (2d) 733 2

Broderick v. Aaron, 268 N. Y. 260, 197 N. E. 274....13, 16

Brown v. Rosenbaum, 287 N. Y. 519, 41 N. E. (2d) 77..13, 15

Collins v. Caldwell, 29 F. (2d) 329..... 12

Continental National Bank v. Holland Banking Co., 60 F. (2d) 823 8

Earle v. Carson, 188 U. S. 42 13

Fletcher v. Porter, 20 F. (2d) 23..... 11

Fowler v. Crouse, 175 Fed. 646 .....13, 15

Hodges v. Meriweather, 50 F. (2d) 29.....13, 15

Hoehn v. Crews, et al., 144 F. (2d) 665..... 3

PAGE

Lawrence National Bank v. Rice, 83 F. (2d) 642..... 12
McClelland v. Merchants & Miners National Bank, 77 Colo. 302, 236 Pac. 774 13
McDonald, Receiver, v. Dewey, 202 U. S. 510.....13, 14
Richards v. Attleborough National Bank, 148 Mass. 187, 19 N. E. 353 10
Scott v. Deweese, 181 U. S. 202 14
State of Ohio v. Union Trust Co., 137 Pa. Super. 175, 8 Atl. (2d) 476..... 12
White v. Knox, 111 U. S. 784..... 8

STATUTES.

Sec. 64, Title 12, U. S. C. A..... 6, 9

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1944.

No. 518

M. C. GARBER, *Petitioner,*

vs.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, *NEE* CREWS, AND MARY WILLIS, *NEE* CREWS, *Respondents.*

BRIEF *of* RESPONDENTS.

The statement in petitioner's brief is of such great length that it is unwieldy and it seems advisable to make a shorter statement. We, therefore, state what we believe to be the facts material to the determination of the question presented.

Respondents' Statement of the Case.

Petitioner was a stockholder in a national bank and on November 14, 1929, made a bona fide sale and transfer of such stock and such transfer was on that date entered on the records of the bank. (Findings 14 and 15, R. 56 and 57.)

At the close of business on November 25, 1929, the bank sold its assets to another bank and ceased to carry on a banking business and went into voluntary liquidation. (Para-

graph 6 of Statement of Matters Stipulated, R. 27; also, second paragraph of Findings, R. 39.)

Subsequently, in 1937, respondents recovered a judgment against the bank for $249,000—the basis for the judgment being the participation by the bank in the embezzlement of government bonds belonging to respondents, which bonds had been deposited for safe-keeping in such bank, which embezzlements "began in 1922 and continued until some time not long prior to liquidation." (Finding 1, R. 49; also, Findings, paragraph beginning near top of page, R. 43 and continuing to and including R. 44; also, *American National Bank of Enid* v. *Crews*, 191 Okl. 53, 126 P. (2d) 733—the entire opinion in which case is in evidence, as mentioned in last paragraph of footnote 29 to Findings, R. 44.)

Including the above claim of respondents, the bank was insolvent from a period prior to and on November 26, 1929, the date it closed and ceased to do business, and at all times thereafter it was insolvent, taking into consideration that claim; but not taking it into consideration, or excluding it from computation of the liabilities, the bank was solvent until November 26, 1929. (Findings 10 and 11, R. 53 and 54.) It is the above judgment and the fact that it is unpaid and that the bank is insolvent and has nothing with which to pay the same which gives vitality to the stockholder's liability and makes necessary the assessment. (Finding 2, R. 49; also, Findings 4 to 9, R. 52 and 53; also Conclusions 46, 47, 48, 49, 51, 53 and 58, R. 68, 69, 70 and 71.)

The present suit against the stockholders of the bank is in the nature of a creditor's suit to, among other things, assess and enforce stockholder's liability (see paragraph of Findings relating to second cause of action, first paragraph, R. 41; also, paragraph beginning near foot of page, R. 41),

including petitioner's liability by reason of the fact that he had transferred his stock within sixty days prior to the date the bank "failed to meet its obligations"—November 26, 1929—being the first day it failed to open or carry on a banking business.

The trial court held that the bank "failed to meet its obligations" when it ceased to carry on a banking business, *viz.*, on November 26, 1929—the date following sale of its assets and being the first day it failed to open for business; and, further held, that stockholder's liability attached as of that date (Conclusion C-7, R. 54); and, further held, that liability attached to those stockholders who had, within sixty days prior to November 26, 1929, transferred their stock, regardless of whether such transfer was or was not made in good faith (Conclusion C-10, R. 57); specifically holding, also (Conclusion C-13, Sec. 1, R. 61; also Conclusion 53, R. 70), that liability attached to the petitioner, he having transferred his stock within such sixty-day period. Accordingly, since the bank was insolvent and respondents' judgment unpaid (Finding 2, R. 49; also, Findings 4 to 9, R. 52 and 53, and Findings 49 and 51, R. 70), an assessment was made and judgment rendered against the petitioner. (Section 11 of judgment, R. 74, including sub-paragraph (a) thereof, R. 76; also, see Sections 13 and 16 of judgment, R. 78 and 79, and Section 24, R. 82.) That judgment was affirmed by the Circuit Corut of Appeals—*Hoehn* v. *Crews, et al.*, and six other cases, 144 F. (2d) 665.

We think we should mention that in petitioner's statement of the case and at various places throughout his brief —and it will be sufficient on this matter to refer to next to the last paragraph on page 5 of such brief—petitioner presents the case as though liability had been adjudged against petitioner on the theory that he transferred his stock "with

knowledge of the impending failure" of the bank. Such is not the case at all and is a wholly imaginary case. The facts were stipulated and liability was decreed and upheld solely on the fact that petitioner transferred his stock within sixty days prior to failure of the bank to meet its obligations. (See paragraph 15 of stipulated facts, R. 34 and 35; Findings 14 and 15, R. 56 and 57; also, see first paragraph, R. 120, such paragraph being from the opinion of the Circuit Court of Appeals; also, see last paragraph of Opinion on Rehearing, R. 132.) We mention this feature in the hope that the question argued may be narrowed to the facts which were stipulated, to the facts upon which liability was decreed by the trial court, and upon which liability was upheld by the Circuit Court of Appeals—indeed, narrowed to a discussion of this case.

Moreover, at various places in petitioner's brief, statements are made (*e. g.*, paragraph beginning near foot of p. 22), which seem to affirmatively imply, if, indeed, they do not specifically state as a fact, "that it (the bank) was a going concern and continued to be for more than sixty days after such sale." Such an assertion is a total variation from the record, and the references given in our statement completely refute all such pretensions. Yet the cold truth is, aside from the imaginary issue—transfer with knowledge of impending failure—mentioned in the preceding paragraph, and aside from contending, without any supporting authority, that the recovery by respondents in 1937 of a judgment, on a cause of action which existed before and at the time the bank closed, does not establish the debt as of the date the bank closed, the substance of petitioner's brief is built up around and bottomed upon the above specified variation from the record. Notice, for example, the last paragraph on page 35 of such brief.

Many times throughout the brief (*e. g.*, last sentence, p. 10, first paragraph following quotation, p. 29, and last paragraph, p. 37), petitioner appears to make some pretension that the fact that, other than respondents, there were no unpaid creditors of the bank, in some way—just how, we are not informed—operates to relieve petitioner of liability.

There is much in petitioner's brief which is not material or relevant to the proposition to which the writ was limited. There are, also, inaccuracies in that part of the brief; however, since all such matter is beside the point and beyond the permissible scope of this brief, it would be idle and unnecessarily occupy the time of this court for us to detail and summarize such portions.

Question Presented for Decision in This Court.

In granting the writ of *certiorrai*, this court ordered:

> "The petition for writ of *certiorari* is granted limited to the first question presented by the petition for the writ * * *."

In the petition for the writ, the first question presented is there stated at considerable length, page 10, and it is repeated at page 14 of brief of petitioner herein. For convenience, we quote it as follows:

> "Whether the petitioner as a former stockholder in the American National Bank of Enid, Oklahoma, is subject to assessment as a stockholder in said bank under the provisions of par. 64, Title 12, U. S. C. A., he having made a bona fide sale of his stock for valuable consideration in good faith on November 14, 1929, more than sixty days before the failure of such association to meet its obligations, or with knowledge of such impending failure and where, at the time of such sale, such

bank was a solvent and going concern except for an undisclosed and unknown liability to a creditor which was not asserted until a suit was filed by such creditor on such claim more than one year subsequent to the sale by petitioner of his stock, and where such claim was unknown to the creditor filing such suit for more than a year after the sale of such stock and upon which claim the creditor recovered a judgment against such bank on October 29, 1937, nearly eight years after the sale by petitioner of his stock in said bank, and where it is an agreed fact in the case that except for such judgment subsequently recovered by such creditor, that the bank in question was a solvent and going concern and that there is no other creditor of said bank, and where the sale of such stock was made by petitioner in good faith and without any intention of trying to avoid liability as a stockholder in such bank."

The question so stated presents more than the record warrants—"transfer with knowledge of impending failure" —and, we think, the question is otherwise inaptly stated. The real question is: Is a stockholder in a national bank liable under Section 64, Title 12, U. S. C. A., where he in good faith transferred his stock within sixty days of the date on which the bank closed its doors and went into voluntary liquidation, though the liability which required an assessment was unknown to those in whose favor it existed until about a year after the bank closed, and except for such liability the bank, when closed, was solvent?

Summary of Points to Be Discussed.

Petitioner in his brief does not set forth any clear statement of the points to be discussed. The first several pages of petitioner's argument are a quotation of the applicable statute and of various excerpts from the opinion of the Circuit Court of Appeals. Then is a rambling discussion which

seems to present the following inquiry: That since respondents did not discover the wrongful acts of the bank until about a year after it closed and ceased to do business and did not recover a judgment against the bank until 1937, though the basis of the judgment was the wrongful acts of the bank prior to the time it ceased to do business in November, 1929—whether such a judgment establishes the debt as of the date the bank ceased to do business.

We shall answer that contention in the argument under the heading:

Point 1: *A creditor of a national bank which has closed and ceased to carry on a banking business, who thereafter establishes his claim by suit and judgment establishes such claim as of the date the bank closed.*

We shall next present:

Point 2: *The liability of stockholders in a national bank is fixed and determined as of the date it ceases to carry on a banking business.*

Thereafter:

Point 3: *Cases relied on by petitioner, distinguished.*

The questions presented are not difficult, and we shall not make them appear difficult by extended discussion.

ARGUMENT.

Point 1: **A creditor of a national bank which has closed and ceased to carry on a banking business, who thereafter establishes his claim by suit and judgment, establishes such claim as of the date the bank closed.**

In *White* v. *Knox*, 111 U. S. 784, the bank was put into insolvency and a receiver appointed by the Comptroller in 1875. The receiver refused to allow White's claim, whereupon White brought suit and in 1883 recovered judgment. Thereupon, White brought the above suit to compel payment of a dividend on such judgment. The court held that White was entitled to be ratably paid with all creditors —saying:

> "A creditor of an insolvent national bank who establishes his debt by suit and judgment after refusal of the Comptroller of Currency to allow it, is entitled to share in dividends upon the debt and interest so established as of the day of the failure of the bank."

And, in the course of the opinion, further said:

> "The business of the bank must stop when insolvency is declared."

In the present case there was no *declaration* of insolvency in 1929, but the cold stipulated fact is that the bank never opened after November 25, 1929, and that it never thereafter carried on a banking business, but went into voluntary liquidation, and that, including the liability to respondents which was later reduced to judgment, it was then insolvent.

See, also, *Continental National Bank* v. *Holland Banking Company*, 60 F. (2d) 823 (prior decisions reported in 43 F. (2d) 640 and 50 F. (2d) 19), where the case was very

similar to this, in that the suit against the bank was not filed until more than three years after the bank ceased to carry on a banking business and went into voluntary liquidation, which suit resulted in a judgment affirmed three years later (*Holland Banking Co.* v. *Continental National Bank*, 324 Mo. 1, 22 S. W. (2d) 821); then, more than six years after the bank had ceased to do business and had gone into liquidation, the above suit was brought to enforce stockholders' liability. That was the basis of federal jurisdiction.

Point 2: **The liability of stockholders in a national bank is fixed and determined as of the date it ceases to carry on a banking business, and this includes the liability imposed by Section 64, Title 12, U. S. C. A.**

That part of Section 64, Title 12, U. S. C. A., involved here reads:

> " * * * The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer * * * ."

The resolution, R. 94, of November 25, 1929, which formally authorized sale of the assets of the bank, also shows, R. 96, that the bank was then "disposing of its current business and thereafter going into voluntary liquidation * * *." A formal resolution was adopted by stockholders on December 20, 1929, R. 97, which ratified the previous sale of the assets of the bank and "Resolved that the American National Bank of Enid, Oklahoma, be placed in voluntary liquidation under the provisions of Sections 5220 and 5221 of the United States Revised Statutes to take effect immediately, * * *."

Whether, therefore, we take November 26, 1929—the first date the bank ceased to open for a banking business—or December 20, 1929—when it formally went into liquidation—as the date of the "failure to meet obligations," makes no difference in the result, since both dates are within sixty days from November 14, 1929—the date of transfer by petitioner. This feature is mentioned by the trial judge in the last paragraph of foot-note *a*, R. 54.

Richards v. *Attleborough National Bank*, 148 Mass. 187, 19 N. E. 353, is an instructive and well considered case. Therein, the Supreme Judicial Court of Massachusetts said:

> "When liquidation commences, all that is left to the stockholder is the right to share in the assets, or the sum produced therefrom, proportional to his holding; while in the case of national banks he is subjected to a limited proportional liability for the debts which the bank may have incurred. * * * Whether the liquidation of the affairs of the bank be voluntary or involuntary, or whether it proceeds under the authority given to continue in existence in order to close its affairs, it is necessarily implied that the respective rights, not only of the creditors and debtors of the bank, but of the stockholders, are to be determined as of the time when it commences. * * * When a bank is in liquidation the liability of the stockholder for the debts of the corporation has been fixed. If there is a debt due from the bank, he cannot transfer his liability to pay that debt to anyone else, so as to affect the creditor, or subject him, in seeking such remedies as he may have against the stockholders, to any examination beyond the list of those who were so when the liquidation commenced."

That decision was in 1889, so, of course, the court was addressing itself to the law as it then existed. By the 1913

Amendment, Sec. 64, *supra,* creditors are entitled to look not only to those who were stockholders when the failure occurred, but, also, to those stockholders who have within sixty days prior thereto transferred their stock, and this feature is made abundantly clear in *Fletcher* v. *Porter,* 20 F. (2d) 23, giving the legislative history of such amendment. Therein, though observing that the language of the Act is plain and unmistakable, and, therefore, does not present a case where resort may be had to reports of committees or debates in Congress to explain a doubtful provision, nevertheless, further says, among other things:

> "The intent of Congress is shown by the majority report of the House committee on banking and currency which, after referring to the practice which had sprung up of transferring stock in order to evade double liability, said: 'It is believed that by making stockholders who have transferred their shares sixty days before a bank failure equally as liable as if they had not made such transfer, the needs of the situation will be met. Some alleged that the requirements should be that stockholders be liable whenever and so long as it could be proven that they had knowledge of the impending bank failure, but that they should not be liable if in good faith they transferred their shares within sixty days before a failure. This sounds plausible but it is in variance with the facts of experience. The process of proving that a stockholder had knowledge is difficult and expensive, if not impossible in many cases, and it is believed that the sixty-day provision is entirely equitable and far more workable."

The above relates, of course, to the sixty-day provision. In the Senate, there was the further amendment whereby, after the word "obligations" there was added "or with knowledge of such impending failure."

In *Lawrence National Bank* v. *Rice*, 83 F. (2d) 642, the Tenth Circuit approvingly said:

> "In *Richmond* v. *Irons*, 121 U. S. 27, 78 S. Ct. 788, 30 L. ed. 864, the court treated voluntary and involuntary dissolutions as two methods of arriving at the same end, followed by the same rights and liabilities."

As held in *State of Ohio* v. *Union Trust Co.*, 137 Penn. Super. 175, 8 Atl. (2d) 476, the closing of the bank constitutes a failure to meet obligations. Whether that closing be involuntary or by going into voluntary liquidation cannot, we think, be material. Its doors are just as effectively closed and its business just as effectively ceases, whether the closing be voluntary or involuntary:

> "The liability of the stockholder to assessment, in case the insolvency of the bank is subsequently ascertained, is fixed as of the date of the bank's failure to meet obligations, not as of the date the insolvency is ascertained or determined. * * * But if it turns out that it is insolvent, the controlling date as to liability relates back to the time the bank failed to meet its obligations, in order to determine who are the persons against whom the statutory additional liability is to be enforced."

In *Collins* v. *Caldwell*, 29 F. (2d) 329, the assets of the First National Bank were at the close of business on December 23, 1927, transferred to and taken over by the Greenville National Bank, which bank assumed all the liabilities of the First National, except as to stockholders. The First National did not thereafter open for business. On January 11, 1928, the Comptroller took over the affairs of the First National and appointed a receiver. The court held that a failure of the First National to "meet its obligations" occurred on December 24, 1927—the first day it failed to

that a stockholder who transferred her stock on November 5, 1927, which was within sixty days prior to December 24, 1927, was liable under Section 64, *supra*. There, insolvency was not *declared* until January 11, 1928, which was more than sixty days after the stock transfer, but the court held that the bank failed to meet its obligations when it failed to open on December 24, 1927.

If interested in further authority, we commend to the court *McClelland* v. *Merchants & Miners National Bank*, 77 Colo. 302, 236 Pac. 774, and *Broderick* v. *Aaron*, 268 N. Y. 206, 197 N. E. 274.

The effort by petitioner, last paragraph, page 35 of his brief, to avoid the principle of this last case—that closing of the bank occasioned an automatic default in the payment of its debts and liabilities—seems to us, not only to evade the point, but appears to be an effort to leave the impression that the bank in the instant case continued to conduct a banking business for more than sixty days after November 14, 1929—the date of stock transfer by petitioner.

Point 3: **Cases Relied on by Petitioner, Distinguished.**

Petitioner relies on: *Earle* v. *Carson*, 188 U. S. 42; *McDonald, Receiver*, v. *Dewey*, 202 U. S. 510; *Fowler* v. *Crouse*, 175 Fed. 646; *Hodges* v. *Meriweahter*, 50 F. (2d) 29; and, *Brown* v. *Rosenbaum*, 287 N. Y. 510, 41 N. E. (2d) 77.

We assert that none of such cases are applicable, though some of them do involve the imaginary issue which we have previously mentioned as being put forth by petitioner.

Earle v. *Carson*, *supra*, is not based on the applicable statute. That case arose in 1897 (see opinion below, 107

Fed. 639), and the stockholder made a bona fide transfer of his stock prior to the time the bank closed. The statute there involved was amended in 1913 (now being Section 64, Title 12, U. S. C. A.), so as to make transferring stockholders liable in either of two events, *viz.*, if such transfer was *(1)* within sixty days next before the failure of the association to meet its obligations; or, *(2)* with knowledge of the impending failure of the bank.

Our right to recover against petitioner is based on the fact that he was a stockholder and transferred his stock within sixty days of the failure of the bank to meet its obligations. It is established by the agreed facts and the findings in this case that the bank closed and ceased to carry on a banking business on and after November 26, 1929; additionally, that the bank went into voluntary liquidation, at least, not later than December 20, 1929—either of which dates is within sixty days from November 14, 1929, the date of the transfer from petitioner to Oven. Immediately on the failure of the bank to meet its obligations which, we think, beyond dispute was one of the above dates—we think the first, November 26, 1929—the rights of creditors attached under Section 64, *supra*. A stockholder who was such when the failure occurred cannot escape responsibility, *Scott* v. *Deweese*, 181 U. S. 202, 213—which involved the statute before the 1913 amendment. By the 1913 amendment, the liability of stockholders is fixed at sixty days before such failure.

McDonald, Receiver, v. *Dewey, supra*, likewise arose prior to the 1913 amendment—involving transfers made in 1894 and 1895. As to the transfer made prior to the date the bank closed, the gist of the opinion is that the transferror is liable only in the event of bad faith, which would be shown if the transferror knew the bank to be insolvent

at the time of the transfer and transferred to a person of known financial irresponsibility. The case further held, that the burden of showing bad faith was on the one seeking recovery.

Fowler v. *Crouse, supra,* likewise arose under the former statute—involving a transfer made in 1903. The gist of the opinion is that a stockholder (under then existing law) divests himself of double liability by a transfer of his stock when the bank is solvent, or even if insolvent, by a bona fide transfer without knowledge of the insolvency.

In *Hodges* v. *Meriweather, supra,* the transfer was in the early part of 1926, while the bank was an active going concern and about nine months before the bank was, on November 15, 1926, closed by the Comptroller. The transfer was assailed as having been made for the fraudulent purpose of avoiding liability, and as colorable only, and that the transferror knew that the bank was insolvent. The trial court found these issues for the transferror. That judgment was affirmed—the court holding that the burden was on plaintiff to establish such matters; that there was sufficient evidence to warrant the judgment below; hence, that the transfer having been made in good faith while the bank was a going concern and more than nine months before the bank closed, the transferror was not liable to assessment.

Brown v. *Rosenbaum, supra,* relied on by petitioner, is presented under the statement, page 31 of his brief, "The exact question involved in this case has been passed upon in the case of *Brown* v. *Rosenbaum,*" followed by the reporter citation. That case arose in 1933, hence did involve the pertinent statute. The transfer involved was on March 6, 1933, which was during the Banking Holiday proclaimed by the President, at a time, therefore, when the bank was

"closed" under such proclamation. Insolvency was declared and a conservator appointed March 13, 1933. Since the transfer was within sixty days prior to this latter date, of course, the transferror was held liable. The above case was by the transferror against the transferee, to compel the transferee to repay the amount the transferror had been compelled to pay. The defense was that, the bank was "closed" at the time of the transfer, hence had already failed to meet its obligations within the meaning of Section 64, *supra;* that, therefore, the liability of shareholders had already been fixed and that the above transfer did not shift that liability unto the transferee. But the court, very properly, held:

> "When, however, by proclamation of the President and Governor, made pursuant to authority vested in them, the date upon which banking obligations became due and may be paid is postponed, there is, as we have already pointed out, no 'failure' by any bank 'to meet its obligations.' That is the case here. The date of such failure arrives only when a bank fails to open or refuses to meet its obligations which then have matured though other banks are open and carrying on their business without restriction. The Comptroller of the Currency is not charged with responsibility to fix that date. It is fixed according to statute by an act of default, not by an act of insolvency, and the courts must determine when such an act has occurred."

Petitioner attempts to distinguish *Broderick* v. *Aaron*, 268 N. Y. 260, 197 N. E. 274, and eventually, page 36 of his brief, after making what he deems a satisfactory distinction, says that such case supports petitioner's contention. We think he shoots wide of the mark.

In that case, the bank was closed by the Superintendent of Banks, and the court held—consistently with what we believe to be the universal rule—that:

"* * * the closing of the bank occasioned an automatic default in the payment of its debts and liabilities."

Immediately following his quotation of such excerpt, petitioner, page 35 of his brief, in an effort to distinguish that case, says:

"This was bound to be true because the bank was taken over by the Superintendent of Banks *and closed and it no longer continued to conduct the business of a bank.*" (Emphasis ours.)

If petitioner, by the above emphasized part of such statement, does not mean to imply and leave the impression that in the case at bar the bank was not closed on and after November 26, 1929, and that it did thereafter continue to conduct the business of a bank—then what does he mean by such statement?

On the very next page of the decision in the above case (about half way down in the second column on page 277 of 197 N. E.), addressing itself to the proposition that the status of stockholders for the purpose of determining their liability must be fixed as of a particular date and that when so fixed it becomes unchangeable, the court said:

"That date cannot be later than the date of the closing of the bank, when such closing is followed by liquidation."

We have not been referred to any case, and we do not believe that there is any case, holding that the rule which prevails where liquidation is voluntary is any different from the rule which prevails where liquidation is involuntary.

It is not beyond permissible argument, we think, for us to say to our opponent: If he really contends, notwith-

standing this bank closed its doors and never engaged in the banking business after November 25, 1929, and notwithstanding it went into voluntary liquidation not later than December 20, 1929; that, nevertheless, it did not fail to meet its obligations within sixty days from November 14, 1929, then, on oral argument, let him give the date when he says it did fail to meet its obligations.

Conclusion.

Much is said in petitioner's brief to the supposed point that, since respondents did not, prior to the time the bank closed, discover their cause of action against the bank, that, therefore, they should now be turned away without recourse to the only responsible source to which they may look. One is brought to wonder if petitioner does not know that embezzlers do not usually make known their surreptitious acts to their victims, and that embezzlement and concealment of the resulting spoliation go hand in hand.

Reduced to its final analysis, petitioner's argument is this: Though respondents obtained a judgment satisfying the court and jury and the Supreme Court of the State of Oklahoma, that such embezzlements had occurred and had been concealed, including a satisfactory showing as to why respondents had not earlier discovered the same—that, nevertheless, respondents must now be told that, since, before discovery, the bank had closed and was insolvent and respondents left without recourse unless against stockholders in a bank which had grown fat upon respondents' money ($249,000); that, because of the bank's concealment, such recourse cannot be had. Such a pretension is but to say, that the greater the fraud, the greater the security from responsibility therefor.

There is good reason why no pertinent case is cited in support of petitioner's contentions. His contentions find no support either in reason or in the decided cases, and the length of this brief can be justified only in the fact that petitioner's brief is but a rambling discussion and does not clearly exhibit the case.

Respectfully submitted,

L. G. OWEN,
Attorney for Respondents.

CHRISTY RUSSELL,
M. F. PRIEBE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 518.—October Term, 1944.

M. C. Garber, Petitioner, *vs.* Ralph Crews, Charley Crews, Robert Crews, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 26, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

We are called upon to determine the application in the circumstances of this case of Sec. 23 of the Act of Dec. 23, 1913,[1] which imposes liability upon stockholders of a closed national bank.

November 25, 1929, the American National Bank of Enid, Oklahoma, pursuant to a resolution of its directors, which recited that it contemplated "disposing of its current business and thereafter going into voluntary liquidation," sold its business and transferred its assets to the First National Bank of the same city in consideration of the payment of $350,000 and the assumption of its liabilities as disclosed by its books. The purchasing bank retained $110,000 to guarantee the collection of negotiable paper taken over and to cover certain real estate temporarily retained by the seller. American closed its business and promptly distributed the $240,000 cash received ratably amongst its stockholders.

The respondents were parties to an agreement, made in 1922, whereby large sums were deposited in a bank to await the settlement of disputes relative to the ownership of the funds deposited. In 1930 settlement was reached and demand made by the respondents for the payment of the deposit. It was then discovered that the fund had been dissipated and that officers of American, which was a correspondent of the bank of deposit, had participated in the embezzlements. The respondents thereupon brought action in a State court against American, its officers and directors, to fasten liability on the bank and the individuals. A judgment

[1] c. 6, 38 Stat. 251, 273, 12 U. S. C. § 64.

against American for $249,000 was affirmed by the Supreme Court of Oklahoma.[2]

The respondents brought the present suit in the District Court for Western Oklahoma to establish a trust in the liquidating dividend of $240,000 paid by American to its stockholders and to recover from the stockholders the amount necessary to satisfy the balance of the judgment remaining after restitution by stockholders of the liquidating dividend; that is, to enforce the double liability of stockholders. Recovery was had on each cause of action, and also on a third against the former directors of American. The Circuit Court of Appeals affirmed the judgment on the first and second causes of action and ordered dismissal of the third.[3]

On November 14, 1929, the petitioner sold his stock in American in good faith and for a valuable consideration to one Oven. December 20, 1929, the stockholders and directors of American held the necessary meetings and took appropriate action under the National Bank Act,[4] to go into voluntary liquidation and thereafter such liquidation went forward. It will be observed that the sale of petitioner's stock was within sixty days of November 20th and within sixty days of December 20th. The petitioner was a defendant in the present action to enforce stockholders' liability and judgment went against him as a stockholder. In a petition for certiorari he urged a number of defenses which the Circuit Court of Appeals had overruled. We granted certiorari limited to the question whether his sale of his stock relieved him of liability.[5]

Does § 23 of the Act of 1913 justify the judgment against the petitioner? The statute reads in part:

"The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer."

---

[2] American National Bank of Enid v. Crews, 191 Okla. 53, 126 P. 2d 733.

[3] Hoehn v. Crews, 144 F. 2d 665.

[4] 12 U. S. C. § 181.

[5] 323 U. S. —.

We are of opinion that the petitioner is within the plain terms of the law. On its face, the Act grants no exemption due to the facts that the sale was made for consideration and in good faith; that, at the time, American was believed to be solvent; or that the existence of the claim ultimately established by the respondents was then not known to the respondents or to the petitioner.

Prior to the adoption of § 23 as a part of the Federal Reserve Act of 1913,[6] the liability of shareholders in a national banking association had been imposed by R. S. 5151. Section 23 of the Act of 1913 reenacted, with slight verbal changes, the first clause of the first sentence of R. S. 5151, which provided:

"The shareholders of every national banking association shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares;"

R. S. 5151 had been before this and other courts for interpretation and, under it, it was held that the gist of any action to impose liability upon a stockholder who had transferred his shares prior to the actual closing of the bank was that the transfer was not a real one or was fraudulent; that is, made with the purpose to avoid the statutory liability.[7] It is obvious that when Congress came to write the Act of 1913 it intended, while leaving the right of recovery for transfers not falling within sixty days of the bank's closing to be adjudged according to the old standard of fraud or intended evasion of liability, to announce a drastic new rule denying effect to all transfers made within sixty days of the bank's cessation of business. It is impossible to read the new enactment of 1913 in any other sense. The only cases dealing with the question in lower federal courts have so held.[8]

The petitioner insists that, as the initiation of the liquidation of American was voluntary, no cause of action against stockholders arose by reason of this action. But we think that where a bank closes its doors and ceases to transact business the right

[6] *Supra*, Note 1.

[7] National Bank v. Case, 99 U. S. 628; Bowden v. Johnson, 107 U. S. 251; Whitney v. Butler, 118 U. S. 655; Stuart v. Hayden, 169 U. S. 1; Earle v. Carson, 188 U. S. 42; McDonald v. Dewey, 202 U. S. 510.

[8] Fletcher v. Porter, 20 F. 2d 23, and Collins v. Caldwell, 29 F. 2d 329, are in accord with the decision of the Circuit Court of Appeals in the instant case.

of creditors or of a receiver to enforce stockholders' liability matures at the time of such closing whether as a result of voluntary action or of adverse action by the Comptroller of the Currency, or of the appointment of a receiver, if at that time the bank was insolvent, as American undoubtedly was, if the spondents' claim was taken into the reckoning.[9]

The judgment of the court below was right and must be affirmed.

[9] Compare Richmond *v.* Irons, 121 U. S. 27, 48, 50.